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Rights Litigation Piggybacking: Legal Mobilization Strategies in LGBTIQ International Human Rights Jurisprudence

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RIGHTS LITIGATION PIGGYBACKING: LEGAL MOBILIZATION
STRATEGIES IN LGBTIQ INTERNATIONAL HUMAN RIGHTS
JURISPRUDENCE

*Lucas Lixinski**

Abstract

This Article examines the Lesbian, Gay, Bisexual, Trans*, Intersex, and Queer (LGBTIQ) movement’s engagement with international human rights adjudication from the perspective of its borrowing from or piggybacking on the strategies and tactics of other international social movements for historically disadvantaged groups, particularly race, gender, and indigenous people. Piggybacking has shaped the rights goals of the LGBTIQ movement, which are then translated into the language of international human rights law. In this translation process, certain objectives get foregrounded at the expense of others, and the movement essentializes itself in the pursuit of strategic gains, often to lasting unintended consequences that harm the movement itself. In mapping these trends, this Article argues that social movement advocates would do well to be more mindful of the piggybacking’s strategic costs, particularly as new international rights-oriented social movements emerge in areas like disability rights and the rights of older persons.

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INTRODUCTION

The international litigation of human rights by social groups poses many challenges. However, it still fulfills the key purpose of international human rights law, which is to provide an avenue of recourse beyond the nation-state. In the current state of the rights of Lesbians, Gays, Bisexual, Trans*,¹ Intersex and Queer (LGBTIQ), and other minorities grouped in relation to their sexual or gender identity,² the importance of having remedies that bypass and transcend the state is paramount. In many countries around the world, LGBTIQ individuals are persecuted, discriminated against, even murdered.³ Often these acts are, if not encouraged, at least condoned by the state.⁴ International human rights

1 The use of the asterisk in “trans*,” as opposed to the word “transgender,” is meant to be “a shorthand way of signaling that you were trying to be inclusive of many different experiences and identities rooted in acts of crossing, and not get hung up on fighting over labels or conflicts rooted in different ways of being different from gender norms.” Therefore, I adopt this terminology in this Article. SUSAN STRYKER, *TRANSGENDER HISTORY: THE ROOTS OF TODAY’S REVOLUTION* at 11 (2017).

2. *Id.* The acronym is constantly evolving, and now encompasses at least nine letters, according to one recent account. These are LGBTIQQA (lesbian, gay, bisexual, trans*, intersex, queer, questioning, asexual, and allies). I choose to focus on LGBTIQ partly for convenience, and partly because the identities of the last three categories (questioning, asexual, and allies) has not been the subject of international rights litigation to the best of my knowledge.

3. See generally LUCAS RAMÓN MENDOS, *INT’L LESBIAN, GAY, BISEXUAL, TRANS, AND INTERSEX ASS’N (ILGA), ILGA REPORT ON STATE-SPONSORED HOMOPHOBIA* (13th ed. 2019), https://ilga.org/downloads/ILGA_State_Sponsored_Homophobia_2019.pdf; HUMAN RIGHTS WATCH, *#OUTLAWED – THE LOVE THAT DARE NOT SPEAK ITS NAME*, http://internap.hrw.org/features/features/lgbt_laws/.

4. See, e.g., Samuel Osborne, *Chechnya Leader Ramzan Kadyrov Says He Condone Honour Killings of Gay People*, *THE INDEPENDENT* (July 19, 2017), <https://www.independent.co.uk/news/world/europe/chechnya-ramzan-kadyrov-leader-gay-people-honour-killings-relatives-mma-chechen-detain-russia-a7849346.html>; DANIELE PALETTA, *ILGA, KENYA #REPEAL162*

institutions can remind the state of their commitments to protect these persons, despite a history of “exclusionary impulses” in the area of LGBTIQ rights.⁵

Particularly important institutions in this respect are human rights (quasi-)judicial mechanisms.⁶ For one, their decisions are based on a specific body of law, and their decisions are often binding upon states,⁷ unlike the recommendations of political human rights bodies like the Human Rights Council. Likewise, they provide a direct avenue for redress to aggrieved individuals, allowing for the use of powerful personal narratives to enliven the struggles of an entire group of people. So, even if “rights do not offer us truth, they offer us tactics.”⁸

But highlighting, however indirectly, the struggle of a group through the plight of an individual also presents challenges. First among those is the balancing act within the case between the individual victim’s rights and the interest of an entire social movement. Advocates have pointed out in these circumstances that the “focus must be on the perfect case, not the imperfect clients,”⁹ thus underscoring that individual situations often are pushed to the background to advance a movement’s claims, even if litigation necessitates a focus on individual circumstances. Secondly,

RULING: A STATEMENT BY PAN AFRICA ILGA (May 24, 2019), <https://ilga.org/kenya-repeal-162-ruling-pan-africa-ilga-statement>; see also Susan Dicklitch et al., *Building a Barometer of Gay Rights (BGR): A Case Study of Uganda and the Persecution of Homosexuals*, 24 HUM. RTS. Q. 448 (2012).

5. Bonny Ibhawoh, *Human Rights for Some: Universal Human Rights, Sexual Minorities, and the Exclusionary Impulse*, 69 INT’L J. 612 (2014).

6. For the purposes of this Article, I focus on two judicial and three quasi-judicial mechanisms. The judicial mechanisms are: (1) the European Court of Human Rights (ECtHR) with respect to the European Convention on Human Rights (ECHR); and (2) the Inter-American Court of Human Rights (IACtHR) with respect to the American Convention on Human Rights (ACHR), who have the jurisdiction to issue judgments that are binding on the parties. The quasi-judicial mechanisms, on the other hand, can only issue recommendations or findings on the merits with non-binding character. These are (1) the Inter-American Commission on Human Rights (IACmHR) also with respect to the ACHR; (2) the African Commission on Human and Peoples’ Rights (ACHPR) with respect to the Banjul Charter on Human and Peoples’ Rights; and (3) the Human Rights Committee (HRC) that oversees the implementation of the International Covenant on Civil and Political Rights (ICCPR). See American Convention on Human Rights, Nov. 22, 1969, OAS Treaty Series No. 36, 1144 U.N.T.S. 123, 9 I.L.M. 99 (hereinafter ACHR); Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. No. 5; 213 U.N.T.S. 221 (hereinafter ECHR); African Charter on Human and Peoples’ Rights, June 27, 1981, 1520 U.N.T.S. 217; 21 I.L.M. 58 (hereinafter Banjul Charter); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; 6 I.L.M. 368 (hereinafter ICCPR).

7. With the exception of quasi-judicial bodies, as indicated above. However, my goal here is to establish a broader adjudicatory discourse of human rights jurisprudence on LGBTIQ issues and social movements.

8. Kay Lalor, *Constituting Sexuality: Rights, Politics and Power in the Gay Rights Movement*, 15 INT’L J. HUM. RTS. 683, 695 (2011).

9. DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS* 143 (2012).

there is the uneasy relationship between identity politics and the litigation of individual rights in international law, whereby the identity-based claims of an entire group get compressed into one individual's identity for litigation. In this translation process, internal diversity, for instance, gets lost in favor of a homogenized, idealized identity represented by the individual victim bringing the case.¹⁰ Nonetheless, LGBTIQ social movements have, over time, stimulated and benefitted from international human rights law, both through political and (quasi-)judicial fora. This piece focuses on the latter.

My descriptive thesis is that LGBTIQ rights as a social movement have piggybacked on strategies and tactics¹¹ of other social movements and their rights claims, and these have shifted over time. The same has happened in international rights jurisprudence. In examining cases brought by LGBTIQ individuals, or concerning LGBTIQ matters more generally, I seek to map out how certain rights benefit some aspirations of a social movement, but often in detriment of others. Normatively, I argue that the judicialization of LGBTIQ rights and other rights-seeking social movements would do well to be more mindful of the strategic costs of the victories in individual cases, based on specific rights, since the victories in some areas make commitments about LGBTIQ identity that do not necessarily sit well with other aspects of the rights movement. Therefore, to map out the use of these tactics contributes to thinking more broadly about LGBTIQ identities and strategies as read through the prism of international human rights law and its adjudication. This thinking allows for more self-aware tactics and strategies for this movement, which may also benefit other emerging movements for historically disadvantaged groups, like persons with disabilities, and, more recently, older persons.

Naturally, I do not mean to say that all cases brought on LGBTIQ issues are part of a masterplan of strategic litigation.¹² Nor do I suggest

10. Rafael Carrano Lelis & Gabriel Coutinho Galil, *Direito Internacional Monocromático: Previsão e Aplicação dos Direitos LGBTI na Ordem Internacional*, 15 BRAZILIAN J. INT'L L. 278 (2018).

11. There is an important difference between tactics and strategies, with the former meaning short-term gains to win an argument or case, and the former longer-term projects of emancipation. As Robert Knox points out, this difference is often missed by (critical) international lawyers. See Robert Knox, *Strategy and Tactics*, 21 FINNISH Y.B. OF INT'L L. 193, 194–95 (2012). Specifically, in the context of international human rights law, see BEN GOLDER, *FOUCAULT AND THE POLITICS OF RIGHTS* (2015), particularly Chapter 4, titled “Rights between Tactics and Strategy.”

12. Even if strategic litigation via international courts to change domestic law does in fact happen, as argued by Giulia Dondoli, *LGBTI Activism Influencing Foreign Legislation*, 16 MELB. J. INT'L L. 124 (2015). See also Mayur Suresh, *The Right to be Public: India's LGBT Movement Builds an Argument About Privacy*, 20 AUSTL. J. OF ASIAN L. 1 (2019) (arguing that the 2018 India Supreme Court Judgment decriminalizing sodomy “and the constitutional arguments that were presented were produced by the LGBT movement” and “not a product of single petition [nor] the creation of individual lawyers”).

that the LGBTIQ movement is uniform around the world.¹³ Rather, what this mapping exercise seeks to show is how, by choosing and borrowing from certain successful tactics of other social movements, a specific movement can advance its causes, either by path dependency or short-circuiting. The former, path dependency, finds less resistance but suffers from repeating the same blind spots of previous movements. The latter can advance a movement's claims more rapidly in theory, but often finds too much resistance, and the stakes are higher, particularly in the event of a negative outcome.

In weaving the jurisprudence of international human rights bodies together, I am not particularly concerned with some contingencies, such as whether the case is the direct product of strategic litigation domestically, who exactly brought the case, the specific location, or type of body entertaining the case. These contingencies are sidestepped in favor of a more impressionistic mapping that does not require proving direct causal links; rather, I intend to provide a rough roadmap, which might be transplanted to other contexts like disability and the rights of older persons, aligning with the idea of scholarship as a valuable pathway for advancing causes of social groups.¹⁴

In what follows, I introduce the idea of social movement borrowing by looking at historical literature on the LGBTIQ movement that discusses the influence of other movements while discussing the role of

13. On this variety, see generally MARTEL, *infra* note 15. With respect to another contingency, time, even though I subscribe to a general narrative of sequencing in litigation, I do not think that a right litigated in, say, the 1970s before one body, and the 1990s in another, are fundamentally different because of the status of the LGBTIQ movement around the world. Rather, to the extent those cases respond to a domestic (or, at most, regional) state of affairs, it is possible to make them comparable even if they are decades apart (which also partially responds to why the specific forum is not a major concern in how I structure the narrative). Likewise, this atemporal analysis means that I use the term LGBTIQ without taking into account the internal evolution of the movement to include (or exclude) certain subgroups at certain points in time. I do so not because the internal evolution of the movement does not matter; it has deep implications for the ways in which rights litigation is structured, particularly in promoting the visibility or invisibility of certain groups over others within the movement. Therefore, the history of a movement is important, particularly in mapping the ways in which borrowing and piggybacking has happened. Rather, this atemporal treatment of the acronym ties with the purpose of my intervention: rather than a historical intervention about the LGBTIQ movement, I use history to make a case for the ways in which the LGBTIQ movement (in whatever configuration) has borrowed from other movements at any point in time, and then used international human rights litigation. I do so because it is one example of a social movement using international human rights law. In other words, since my primary focus is on legal mobilization in international human rights by emerging social movements, using LGBTIQ rights as a case study, rather than an intervention about the LGBTIQ movement itself, to dwell on the internal evolution of the movement with respect to its membership, as opposed to its strategies, seems counterproductive. That said, at times the shift in membership does matter, as the analysis below will show.

14. Nadine Strossen, *Reflections on the Essential Role of Legal Scholarship in Advancing Causes of Citizen Groups*, 49 N.Y.L. SCH. L. REV. 505 (2004–2005).

identity politics in rights litigation and the question of individualization of claims of a broader movement. After that, I discuss international rights litigation tactics by looking at the spectrum of LGBTIQ cases across international human rights bodies. I then use this description to offer a roadmap of international rights litigation for minority social movements that can be useful in other contexts. Lastly, I offer some concluding remarks, including some directions for further research.

I. SOCIAL MOVEMENT BORROWING

While it is impossible to account for a full history of LGBTIQ social movements around the world in the 20th century, let alone more broadly the history of social movements in pursuit of human rights for historically disenfranchised groups, it is important to highlight a few key themes that emerge repeatedly.¹⁵ For our purposes, I focus on social movement borrowing, defined as how emerging movements adopt and adapt the language and tactics from other movements. Relatedly, I also focus on the use of rights as weapons, and ultimately legal mobilization through strategic litigation. I am wary of essentializing movements and disenfranchised groups through this analysis, but, as we will see below,

15. While the account below is admittedly slanted towards authorities referring to Anglo-American realities, the trends they outlined are confirmed in literature relating to other contexts. See, e.g., RICHARD PARKER, *BENEATH THE EQUATOR: CULTURES OF DESIRE, MALE HOMOSEXUALITY, AND EMERGING GAY COMMUNITIES IN BRAZIL* (1999); Sabrina Ragone & Valentina Volpe, *An Emerging Right to a "Gay" Family Life? The Case Oliari v. Italy in a Comparative Perspective*, 17 GERMAN L. J. 451 (2016) (comparing Spain, Portugal, Italy, and France); Hernan M Duarte, *El Poder de Discriminar y los Derechos de las Minorías LGBTI*, 7 REVISTA COSTARRICENSE DE DERECHO INTERNACIONAL 61 (2017) (covering a range of Central American examples); Michèle Finck, *The Role of Human Dignity in Gay Rights Adjudication and Legislation: A Comparative Perspective*, 14 I-CON 26 (2016) (comparing United States, Canada, South Africa, Mexico, Italy, Spain, France, Belgium, and the United Kingdom); Nathan Madson & Jenny Odegard, *Cause of Action: Using International Human Rights Law to Advance Gay Rights*, 70 NAT'L LAW. GUILD REV. 65 (2013) (focusing on Russia); Kerman Calvo & Gracia Trujillo, *Fighting for Love Rights: Claims and Strategies of the LGBT Movement in Spain*, 14 SEXUALITIES 562 (2011) (focusing on Spain); Solomon Eborah, *Africanising Human Rights in the 21st Century: Gay Rights, African Values and the Dilemma of the African Legislator*, 1 INT'L HUM. RTS. L. REV. 110 (2012) (focusing broadly on Africa); Adam Kretz, *From "Kill the Gays" to "Kill the Gay Rights Movement": The Future of Homosexuality Legislation in Africa*, 11 NW. J. INT'L HUM. RTS. 207 (2013) (focusing on Uganda, Zimbabwe, and Malawi); Adetoun Adebajo, *Culture, Morality and the Law: Nigeria's Anti-Gay Law in Perspective*, 15 INT'L J. DISCRIMINATION L. 256 (2015) (focusing on Nigeria); Suresh, *supra* note 12 (focusing on India); Venetia Kantsa, *The Price of Marriage: Same-Sex Sexualities and Citizenship in Greece*, 17 SEXUALITIES 818 (2014) (focusing on Greece). That said, at the same time I am wary of attempting to universalize LGBTIQ experiences. As Michael Bronski has put it, even though Western influences and the rise of human rights have been important factors in the advancement of LGBTIQ causes, a search for universality is "politically suspect." MICHAEL BRONSKI, *Foreword* to FRÉDÉRIC MARTEL, *GLOBAL GAY: HOW GAY CULTURE IS CHANGING THE WORLD* vii-viii (2018).

essentialization is often deployed by these groups as a tactical tool. It may be an inevitable cost of the decision to litigate.

The term “social movement” has been criticized for encompassing too much.¹⁶ Still, it is generally seen as standing for “a distinctive form of contentious politics” that has become commonplace, particularly in the 21st century.¹⁷ Charles Tilly, a key theorist on social movements, states they contain three elements: (1) collective claims against governmental or other target authorities; (2) claim-making performances; and (3) “public representations of the cause’s worthiness, unity, numbers, and commitment.”¹⁸ Legal mobilization around human rights can be seen as straddling the first and second categories, but, as discussed below, it also speaks (at least in the LGBTIQ space) to the third element, particularly “worthiness,” with unintended consequences.

Legal mobilization through strategic litigation inevitably constrains the possibilities of a movement, as it aligns claims to specific forms of resistance.¹⁹ Legal claims and jurisprudential technologies flatten complex factual backgrounds, and in the LGBTIQ context, often ignore “the presence of gender, race, age, and class pulsing in the background.”²⁰ Likewise, the same tactics can be used against rights, particularly in the LGBTIQ sphere, as discussed further below.²¹ But social movements create legal opportunity structures, which are valuable ways of pursuing the expansion of rights.²² That said, there is an imminent risk that the focus on litigation can take politics off the table, as the rights that can be legally invoked and their constraints shape the possibilities of social movements in restrictive and de-politicizing ways.²³

Social movements’ claims are often combined in three kinds: (1) program claims that support or reject the target authority’s proposed actions in relation to the movement; (2) identity claims that assert the force of the movement, particularly its worthiness, unity, numbers, and commitment; and (3) standing claims that connect the movement to other political actors such as excluded minorities, particularly relevant for our purposes.²⁴ Identity claims accompany social movements at least as far

16. CHARLES TILLY, *SOCIAL MOVEMENTS, 1768–2004* ix (2004).

17. *Id.* at 3.

18. *Id.* at 7.

19. MICHAEL MCCANN, *Litigation and Legal Mobilization*, in *THE OXFORD HANDBOOK OF LAW AND POLITICS* 522, 532–33 (Gregory A. Caldeira et al. eds., 2008).

20. CARPENTER, *supra* note 9, at xii.

21. *Id.* at 534.

22. ELLEN ANN ANDERSON, *OUT OF THE CLOSETS AND INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION* (2005).

23. GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

24. TILLY, *supra* note 16, at 12.

back as the 19th century,²⁵ meaning that the focus on the 20th and 21st centuries can be misleading. Still, a key difference this Article accounts for is the use of international human rights (quasi-)adjudicatory mechanisms, which did not exist until the second half of the 20th century.

A. LGBTIQ as a Borrower and Piggybacker

With respect to borrowing, the LGBTIQ movement's history is often told by drawing parallels with race, gender, indigenous rights, and other movements.²⁶ Even the theorizing of social movements is often done in a U.S. context by aligning race, feminism, and LGBTIQ movements along the same continuum.²⁷ These movements shared their intention to seek citizenship in a state. While the race and feminist movements did not ask for approval from society (in the way the LGBTIQ movement does), there were shared goals of protection from violence, toleration, human liberty, and equal access. At the same time, pursuit of these goals often dispensed with goals like economics and cultural validation, which were picked up again by the more identity-based LGBTIQ movement,²⁸ borrowing from other movements with also significant economic and identity components, like the labor movement in countries like Australia,²⁹ and even the indigenous movement.³⁰

The connection of the LGBTIQ movement to gender is well-known, particularly through groups like the Lavender Menace, that showcased how the feminist movement left lesbians behind to de-radicalize the movement.³¹ The connection between the feminist and LGBTIQ movements is often made in connection to privacy rights and control over the body, but, as discussed below, it also extends to other domains. On

25. *Id.* at 71. However, there are critiques of the alignment of race and LGBTIQ rights, which characterize the LGBTIQ movement's rapprochement to race rights as "cultural appropriation." See KENYON FARROW, *Is Gay Marriage Anti-Black???*, in *AGAINST EQUALITY: QUEER REVOLUTION NOT MERE INCLUSION* 33, 41 (Ryan Conrad ed., 2014). Other critiques of this alignment claim LGBTIQ communities are artificial minorities, which can "steal" the rights won by other historically disadvantaged groups, like women, persons of African-descent and other racial origins, persons with disabilities, and older persons. See CARPENTER, *supra* note 9, at 33–34 (citing church leaders in Texas).

26. LINDA HIRSHMAN, *VICTORY: THE TRIUMPHANT GAY REVOLUTION* xiv (2012). See also STRYKER, *supra* note 1, at 82, 84 (describing how the gay and trans movements in the mid-1960s used very similar techniques as the race civil rights movement in the U.S., and notably at the same time). Stryker also notes "the extent to which the tactics of minority rights activism cross-fertilized different movements. [...] Many of the queer people [engaged] were themselves people of color, and they were not 'borrowing' a tactic developed by another movement."

27. HIRSHMAN, *supra* note 26, at xiv–xv.

28. *Id.* at xv.

29. LIZ ROSS, *REVOLUTION IS FOR US: THE LEFT AND GAY LIBERATION IN AUSTRALIA* viii (2013).

30. *Id.* at 73–74; see also Lelis & Galil, *supra* note 10, at 292–93.

31. Making the connection also in Australia, see ROSS, *supra* note 29, at 49.

race, though, the comparison is less explored globally, even if it is an issue raised in the context of strategic litigation. A case on LGBTIQ discrimination in the southern United States, for instance, surveys the history of discrimination against racial minorities to make a comparison in the area of hate crimes.³² In countries like Australia, it is well-documented that the politics and practice of the LGBTIQ movement drew on feminist, race, and leftist movements.

There is a sense of alignment and mutual support among different social movements. People draw their sense of identity from groups they are already in, which creates a positive sense of self and gives them an incentive to collectively change the way society perceives them.³³ The Stonewall riots, for instance, included on their final day the support of left-leaning straight movements (economics), alongside Black Panthers (race), “and a general sampling of the rebellious in the New York area. The word was out: the last great twentieth-century movement has happened.”³⁴ Emerging movements need those alliances because the identity that movements seek to protect is at its most fragile when the movement is a stand-alone one. These alliances, however, are often temporary, as the use of rights as weapons discussed below shows. They also create the question of how to prioritize among the different goals when the political surplus generated by these alliances needs to be expended.³⁵

One notable difference concerning other social movements, though, speaks to identity and strategic essentialism, further discussed below. Specifically, movements like race and gender shared many aspirations with LGBTIQ movements. Still, the former two movements were seldom characterized as “sinful, crazy, criminal, and subversive,” meaning that they could more easily access the benefits of security, freedom, and equality. LGBTIQ persons, on the other hand, had to first fight a battle for acceptance of their identity, a battle that was heightened for LGBTIQ women and LGBTIQ persons of color.³⁶ For example, in the U.S. context, registration was denied to a gay legal defense fund, on the grounds that they were not comparable to a similar association protecting Puerto Ricans because gays did something wrong, and representing homosexuals, therefore, could not be seen as benevolent or charitable. Such a conclusion strongly echoes Christian ethics regarding charities.³⁷

32. ROBERTA KAPLAN, THEN COMES MARRIAGE: *UNITED STATES V. WINDSOR* AND THE DEFEAT OF DOMA 307 (2015).

33. HIRSHMAN, *supra* note 26, at xv.

34. *Id.* at 105.

35. *Id.* at 111.

36. *Id.* at 110–11.

37. *Id.* at 148.

Another instance that differentiates the LGBTIQ movement from other social movements is the problem of free-riders or people who can “pass” as non-LGBTIQ.³⁸ These instances dwindle numbers and unity, and also speak to the importance of “coming out” as a key political act in this social movement,³⁹ a tactic also relevant in indigenous movements in countries like Japan.⁴⁰ Crucially, free riders and “passing” can also make alliances with other social movements more difficult by narrowing the goals of the movement away from broader social justice causes because its chosen litigation victims or “respectable” representatives are often those who can “pass.”

The relative “non-conspicuousness” of the movement has, in some instances, acted as a means to mobilize resources and outrage at the expense of intersectionality⁴¹ or even engagement with other minorities. Looking at the U.S. example, Linda Hirshman suggested that an important reason why certain organizations succeeded is that they represented gay white men, who suddenly realized “they did not have the privilege they thought they had.”⁴² In the trans* context, Susan Stryker has shown that “it is often the most privileged elements of a population affected by a particular civil injustice or social oppression who have the opportunity to organize first. In organizing around the one thing that interferes with or complicates their privilege, their organizations tend to reproduce that very privilege.”⁴³ To put it another way, conspicuousness aids the movement itself by dealing with the issue of free riders, while at the same time enabling the movement to construe causes that do not rely on a certain reified identity that reinforces certain forms of privilege.

Despite this uneasy tension with the reproduction of privilege, LGBTIQ advocates have often used the idea that their struggle was based on the unity of all oppressed peoples—race, gender, sexual orientation, economic status.⁴⁴ That confluence has assisted with making allies across

38. *Id.* at 80, 171.

39. *Id.* at 188. But coming out as a political strategy is not without its critics in the LGBTIQ movement. See PHILLIP BRIAN HARPER, *PRIVATE AFFAIRS: CRITICAL VENTURES IN THE CULTURE OF SOCIAL RELATIONS* 116 (1999) (arguing that coming out buys into a category of normalization and normality that is inconsistent with queer theory’s objective to query and redefine normal itself).

40. Jude Isabella, *The Untold Story of Japan’s First People*, SAPIENS (Oct. 25, 2017), <https://www.sapiens.org/archaeology/ainu-prejudice-pride/>.

41. Intersectionality arose initially in gender studies and is the idea of overlapping and multiple identities (for instance, a person who is a woman, and also a person of color). The key insight of intersectionality for our purposes is that identities are not unitary, they overlap, and those overlapping identities have significant impacts in the articulation of claims by socially disadvantaged groups. Jennifer C. Nash, *Re-Thinking Intersectionality*, 89 FEMINIST REV. 1 (2008).

42. HIRSHMAN, *supra* note 26, at 196.

43. STRYKER, *supra* note 1, at 77.

44. ROSS, *supra* note 29, at 91.

a range of movements, but it has left a significant question unanswered. Namely, whether efforts were aimed at leveling the playing field in favor of equal rights, or whether LGBTIQ persons were entitled to special rights.

At the heart of the question are two issues: first is a tension concerning the alignment with other movements, since special rights claims can align strategies in certain respects, but may also compromise personal alliances by creating distance between movements and putting strain on intersectionality. Intersectionality, in this respect, is meant to be a bridge across movements. Still, movements often pit themselves against one another, in what becomes a contest for validity, particularly in the translation of claims into special rights.⁴⁵

Second is the question of whether LGBTIQ people's goals are to "integrate" into mainstream society or be allowed to lead their lives separately. Historically, the same question also plagued the race movement in the U.S., at times oscillating between separatism and integration (Martin Luther King, Jr. believed in the latter).⁴⁶ For LGBTIQ identity, to argue for sameness at one point in the movement meant to concede the "abnormality" of identity, and sameness was rejected.⁴⁷ It was the debate on marriage equality that brought equal treatment back to the center of the conversation, in many respects. It sidelined special rights arguments in favor of a specific construction of equality. Karen Engle has argued that the focus on equality erases the need to understand LGBTIQ existence, thus being preferred by governmental authorities (who can bypass accommodation) and advocates (who get quicker results). In doing so, though, this erasure can have troubling consequences, and therefore a thick description of special facts necessarily calls for special rights for LGBTIQ persons.⁴⁸ In other words, "becoming as mainstream as possible is unlikely to lead to much change in the status quo."⁴⁹

At the same time, legal mobilization in an international human rights context requires framing of contexts under identifiable rights, and it may be that aspiring to sameness presents a clear tactical advantage.⁵⁰ As Martel has put it, aspirational sameness helps de-Westernize and universalize the conversation by couching it in the language of human rights, and "LGBT rights are an intrinsic[] human rights, beyond any controversy or polemic, because they are indeed about the *application of*

45. I am grateful to Rosemary Kayess for this insight.

46. HIRSHMAN, *supra* note 26, at 91.

47. *Id.* at 38.

48. Karen Engle, *What's So Special About Special Rights?*, 75 DENV. U. L. REV. 1265, 1267 (1998).

49. *Id.* at 1302.

50. Not to mention the legal debates surrounding standard-setting and the creation of new rights versus the utilization of existing ones, as has been the case in the context of the rights of older persons, discussed below. I am thankful to Annie Herro for this insight.

existing rights—the rights to life, freedom, personal safety, equal protection against any form of discrimination, freedom of expression, privacy, and so on . . .”⁵¹ Put another way, while the binaries of sameness and special rights need to be contested, these same categories can be utilized,⁵² and there is room for (quasi-)adjudicatory bodies to emphasize idiosyncrasies of historically disadvantaged groups represented by social movements (like the LGBTIQ group).⁵³

Concerning intersectionality, the matter also speaks to the unity of the movement, a key requirement for its success. Fractures in the LGBTIQ movement have come up once people realized that just being gay together was not enough to erase all differences. Di Otto, for instance, made the case that just being a lesbian is not itself a radical position. That thinking so is a misunderstanding,⁵⁴ a position also supported by trans* advocates.⁵⁵ These questions of identity and what it means to choose among different paths as a strategic matter in rights claims will be discussed below. However, it is important to bear in mind that both claims for equal and special rights are often on the table and in tension with one another, complicating the possible uses of international human rights laws and institutions.

B. *Rights as Weapons and the Alliances and Enemies of a Movement*

The use of rights language and tools is an important element to support the claims of social movements. These rights can be used as shields, or also as weapons, as Clifford Bob has shown.⁵⁶ The call for rights creates a form of “cognitive liberation” that fosters a sense of group solidarity and unity.⁵⁷ Used as a rallying cry, the language of rights relies on being human, universal, absolute, apolitical, and the existence of a wrong.⁵⁸ This rhetoric also helps identify allies, as the use of UN women’s conferences by lesbian and gay groups shows.⁵⁹ Rights can also be used as shields and parries to counter threats,⁶⁰ as camouflage to mask the

51. MARTEL, *supra* note 15, at 253 (emphasis in original).

52. Matthew Waites, *Critique of ‘Sexual Orientation’ and ‘Gender Identity’ in Human Rights Discourse: Global Queer Politics Beyond the Yogyakarta Principles*, 15 CONTEMP. POL. 137, 139 (2009).

53. Paula Gerber & Joel Gory, *The UN Human Rights Committee and LGBT Rights: What is it Doing? What Could it be Doing?*, 14 HUM. RTS. L. REV. 403, 403 (2014).

54. Cited by ROSS, *supra* note 29, at 106.

55. STRYKER, *supra* note 1, at 5.

56. CLIFFORD BOB, *RIGHTS AS WEAPONS: INSTRUMENTS OF CONFLICT, TOOLS OF POWER* 5 (2019).

57. *Id.* at 29–30.

58. *Id.* at 27–28.

59. *Id.* at 32.

60. *Id.* at 51–61.

motives of certain groups,⁶¹ as spears to overturn laws,⁶² as dynamite to destroy cultures,⁶³ as blockades to suppress,⁶⁴ or as wedges to break social movements.⁶⁵

The tactic of rights as dynamite has been used to victimize LGBTIQ groups in several countries, as it uses the rights of the majority to depict the other group as disruptive of the nation's morality, culture, or sovereignty.⁶⁶ This tactic is more likely to work in domestic contexts, where the majority's hold on power is more stable, but it often fails internationally given the lack of commitment of international institutions to domestic majorities' values and the counter-majoritarian impulses of international human rights law and institutions.⁶⁷ There is a nesting doll feature to this tactic,⁶⁸ though, particularly in the LGBTIQ context, with the rights of sexual minorities seen as an imposition from the outside that can disrupt domestic cultures.⁶⁹ As a result, LGBTIQ groups are often resistant to engage with this tactic, as well as to be portrayed as victims, in no small part "because they are seldom consulted by outsiders about the wisdom of imposing 'universal' rights, with their maximal goals and minimal time frames."⁷⁰ The use of rights as dynamite is thus a powerful reminder of the need not to over-generalize the possibilities of human rights litigation.

Thinking of the different uses of rights as weapons also problematizes the unity of social movements that, as indicated below, is a key element to their success. Specifically, to think of rights as blockades or wedges reminds us of how rights can be used to fragment social movements, whether it is the historical discomfort of women's rights movements with lesbians⁷¹ and trans* women,⁷² or even the use of rights based on medical interventions as a means to entice trans* advocates away from other aspects of the LGBTIQ movement,⁷³ which also comes in response to the

61. *Id.* at 65–92.

62. *Id.* at 93–117.

63. *Id.* at 118–47.

64. *Id.* at 151–84.

65. *Id.* at 185–207.

66. *Id.* at 118–19.

67. *Id.* at 128–29.

68. On a critique of use of metaphors as juris generative and arguing for the possibilities of clashing multiple metaphors in the human rights law context, see Ben Golder, *Thinking Human Rights Through Metaphor*, 31 *LAW & LITERATURE* 301, 324–25 (2019).

69. BOB, *supra* note 56, at 132–39.

70. *Id.* at 147.

71. HIRSHMAN, *supra* note 26, at 112.

72. BOB, *supra* note 56, at 151, 175–82.

73. I am thankful to Jed Horner for this insight. But it is also important to note the unease that some trans* advocates and scholars report with respect to the medical profession. As Susan Stryker puts it, "medical science has always been a two-edged sword—its representatives' willingness to intervene has gone hand in hand with their power to define and judge. Far too often,

gay rights movement's rejection of trans* identity and claims.⁷⁴ The gay rights movement at one point also excluded lesbians (who were thought to be better off with the feminist movement),⁷⁵ and even race, all in the name of "respectability" and integration. This was intended to promote a language of equal rights using the language of economic affluence to speak to heterosexual allies,⁷⁶ showcasing the difficulties of intersectionality. These examples remind us that intersectionality can both promote better relationships across different social movements or be leveraged against rights causes by splintering allied groups and undermining the unity of these movements.

Overall, thus, to think of rights as weapons reminds us that rights are relatively empty tools that can be directed at myriad political goals.⁷⁷ Legal mobilization, as part of these tactics, is particularly concerned with the use of rights as spears, and international human rights (quasi-) courts' counter-majoritarian impulses are an important tendency upon which this strategy relies.⁷⁸ It means broadly the idea that the invocation of legal norms to promote a policy or social reform.⁷⁹ For the specific purposes of this Article, it means using international human rights bodies to generate mandates for a state, region, and even the entire world on what compliance with international legal obligations means for specific social movements.

access to medical services for transgender people has depended on constructing transgender phenomena as symptoms of a mental illness or physical malady, partly because 'sickness' is the condition that typically legitimizes medical intervention." STRYKER, *supra* note 1, at 52.

74. HIRSHMAN, *supra* note 26, at 117, 157. Trans* people were initially a full-blown part of the rest of the gay movement, exclusion came later when they were made sacrificial lambs (and eventually re-integrated). "Transgender activists, three decades later leading their own militant identity movement and demanding the support of the gay and lesbian establishment, attribute the divide to this development. How did it come to be, they ask, reasonably, that a movement revived in part by the queens at the Stonewall Inn in 1969 found them unpalatable allies to soon afterward? As soon as the formerly despised gay men got a little power, they developed a heavily masculine representation of self, leaving little space for their comrades who also challenged norms of gender." See also Amy L. Stone, *More than Adding a T: American Lesbian and Gay Activists' Attitudes Towards Transgender Inclusion*, 12 *SEXUALITIES* 334 (2009) (arguing that gay men have a harder time accepting trans* people than lesbian women).

75. See generally ERIC MARCUS, *MAKING GAY HISTORY: THE HALF-CENTURY FIGHT FOR LESBIAN AND GAY EQUAL RIGHTS* (2002).

76. HIRSHMAN, *supra* note 26, at 220.

77. BOB, *supra* note 56, at 210.

78. *Id.* at 96-97.

79. Lisa Vanhala, *Legal Mobilization*, OXFORD BIBLIOGRAPHIES (Feb. 22, 2017), <https://www.oxfordbibliographies.com/view/document/obo-9780199756223/obo-9780199756223-0031.xml>.

C. Legal Mobilization Based on Identity

The key advantage of legal mobilization in this space is that it allows for the penetration of international human rights discourses as a means to force a shift in domestic law and policy, and also to force a public conversation that paints the rights holders in a sympathetic light. A key disadvantage is to make an individual case a stand-in for an entire disadvantaged group, which leads to essentializing identity in strategic ways.⁸⁰ In other words, it becomes a process whereby “subjects self-surrender to a model that has oppressed them for centuries, a model characterized by ‘juridical normalization [...]’.”⁸¹

Specifically, with respect to identity, the characterization of LGBTIQ (or at least LGB and Q) identity at one point as based on behavior and feelings “made it uniquely vulnerable to persecution and much harder to defend than the congenital, morally neutral characteristics like race and gender.”⁸² Therefore, the protection of the performance of LGBTIQ identity was laden with morality and often a sore point in strategizing. Certain rights tactics were deployed to safeguard these performances first as a matter of privacy, but, in doing so, they became anchored on a notion of “respectability” that essentializes LGBTIQ identity.⁸³

In the LGBTIQ space, the use of identity as a means of pursuing rights claims is complicated by the fact that LGBTIQ identity is seldom innate or learned from established history or family structures, needing to be constructed.⁸⁴ Relatedly, the establishment of difference has often been a key part of the movement, even if attempts to “normalize” LGBTIQ identity have also existed from the early days, drawing on the need for respectability as a currency for rights among affluent elites.⁸⁵ This need for respectability speaks to what Linda Hirshman characterizes as “the four horsemen of the gay apocalypse—Crazy, Sinful, Criminal, and Subversive—[which] still blocked their passage to full social equality [after Stonewall and its advances].”⁸⁶

80. On strategic essentialism in the Indigenous rights movement, see KAREN ENGLE, *THE ELUSIVE PROMISE OF INDIGENOUS DEVELOPMENT: CULTURE, RIGHTS, STRATEGY* (2010) [hereinafter ENGLE, *THE ELUSIVE PROMISE*]; see also Knox, *supra* note 11, at 201–15.

81. Francesca Romana Ammaturo, *The Council of Europe and the Creation of LGBT Identities Through Language and Discourse: A Critical Analysis of Case Law and Institutional Practices*, 23 INT’L J. HUM. RTS. 575, 585 (2019) (citing Mariano Croce, *Desiring What the Law Desires: A Semiotic View of the Normalization of Homosexual Sexuality*, 14 LAW, CULTURE AND THE HUMANITIES 402 (2014)).

82. HIRSHMAN, *supra* note 26, at 46.

83. See generally Calvo & Trujillo, *supra* note 15, at 565 (arguing that the evolution of social movements in Spain “has steadily embraced modes of claims-making that are becoming increasingly desexualized”).

84. HIRSHMAN, *supra* note 26, at 25.

85. *Id.* at 40–41.

86. *Id.* at 129.

In attacking each of these labels, a number of different tactics have been deployed. The crazy label was attacked by engagement with the psychiatric profession, which came at the cost of not “being able to invoke any of the arguments like equality and privacy that constrain the actual liberal state”⁸⁷ since the engagement was primarily about de-classifying conduct and identity as a disease. Fighting this label also meant a disengagement between gay and trans* advocates, since the latter were still caught in a fight with the medical establishment for many decades to come.⁸⁸ The LGBTIQ’s tactic of deploying “tragic anecdotes” as a means of pursuing rights claims was also borne out of confrontations with the psychiatric establishment.⁸⁹ With respect to the sinful label, the tactic was to create separate churches, since it was a religious condemnation of sodomy that originated the criminal law against it. The apparatus of criminal law for LGBTIQ people thus rested on the sinful label, and therefore the separation between church and state, as well as privacy claims, were key in this area. That said, positive religion and morality were also important, and religions were created⁹⁰ as part of mechanisms of social approval.⁹¹ The criminal label speaks directly to challenging sodomy laws, and showcases the uneasiness between private and public behaviors,⁹² discussed further below. Subversion was rooted by stimulating LGBTIQ persons to get back into civil service, and therefore contributing members of society.

Addressing these major labels, litigation has been a key tool deployed. The result has been a LGBTIQ identity that, at least in the European Court of Human Rights (ECtHR) case, is “essentialized, privatized, victimized and respectable,”⁹³ reenacting many of these advocacy tropes.⁹⁴ But, for litigation to be undertaken, there is the challenge of translating the aspirations of a movement into individual claims and then translating the

87. *Id.* at 131.

88. STRYKER, *supra* note 1, at 122–23 (noting at 123 that “[i]n many respects, the transgender movement’s politics toward the medical establishment were more like those of the reproductive justice movement than those of the gay liberation movement.”).

89. HIRSHMAN, *supra* note 26, at 139.

90. *Id.* at 142.

91. *Id.* at 145.

92. *Id.* at 148.

93. Ammaturo, *supra* note 81, at 576.

94. But the IACtHR has fought against those tropes in its latest pronouncement on the matter, the Advisory Opinion 24 of 2017 (Inter-Am. Ct. H.R., Gender identity, and equality and non-discrimination with regard to same-sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights), Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24 (Nov. 24, 2017) (hereinafter OC-24).

outcomes of successful individual cases back onto a movement.⁹⁵ That is not always the case in domestic contexts, where rights cases often focus on the organizations that bring them.⁹⁶ But, internationally, the dynamics are different, and cases center on identified and individualized victims, with advantages and disadvantages. Individualization has been seen as desirable in domestic litigation on LGBTIQ rights because “all too often, the facts tended to fade into the background [therefore, denying the tragic anecdote tactic]. Thus, rather than looking like a case about real people and their lives, these cases tended to look more like a debate between pundits on [television].”⁹⁷ The same possibilities can be tapped into in international contexts (if anything because there seldom are other alternatives).⁹⁸

Historically, therefore, social movements have come together in the pursuance of joint causes, or at least the idea that a victory for one movement might pave the road for others when movements coalesce around broader ideas of historical disenfranchisement. These have meant, among other things, the use of the language of rights as a means to advance these movements’ ideals, since rights is a universal(izable) language that can connect these groups, regardless of whether the claims are for equal or special rights. And the language of rights, important as a social mobilization tool, has also been complemented by specific and strategic litigation, domestically and internationally, over rights. In this scenario, the question remains as to how different rights are deployed, and the bright and dark sides of those strategic choices for the specific causes litigation seeks to advance.

1. International Rights Litigation Strategies

This section focuses on how rights are deployed in international litigation to pursue the goals of historically disenfranchised groups. I focus on international human rights law because of its broader appeal and easier transferability across domestic and regional contexts. Other advantages of the use of international human rights litigation is that it is

95. A concern expressed in the area of transgender rights, at least. See STRYKER, *supra* note 1, at 2–3.

96. KAPLAN, *supra* note 32, at 132.

97. *Id.* at 122.

98. But note that in the African system on human and peoples’ rights, NGOs can bring cases directly as complainants. See Rules of Procedure of the African Commission on Human and Peoples’ Rights, Article 93 (2010); See also Rachel Murray & Frans Viljoen, *Towards Non-Discrimination on the Basis of Sexual Orientation: The Normative Basis and Procedural Possibilities Before the African Commission on Human and Peoples’ Rights and the African Union*, 29 HUM. RTS. Q. 86, 106 (2007) (arguing that NGO advocacy networks in Africa have recommended against pursuing this avenue, as it might result by an endorsement of homosexuality being opposed to “African values” by the Commission, which would be a significant loss for the movement).

an avenue conceived of as an alternative to failing domestic institutions, and one that seeks then to modify not only one state's behavior, but also increasingly to send a message to other countries in the region (and even the entire world) about the minimum standards of treatment of victims in a comparable situation, through the systemic change effect of international human rights judgments.⁹⁹

For present purposes, I do not distinguish between courts (that issue binding judgments) and United Nations Treaty Bodies (that only have recommendatory powers), since I am more interested in the discursive effects of these judgments in relation to rights than in their enforceability. I do note, however, that courts, because they are regional, present specific features for available defenses against rights claims of LGBTIQ potential victims, as discussed below.

I examine how different types of goals for a historically disenfranchised group can be translated into the language of rights protected in key general instruments on civil and political rights. Economic, social, and cultural rights are excluded from this analysis for two related reasons. First, despite the success of the LGBTIQ movement in mobilizing state resources in domestic advocacy and strategic litigation, international claims are couched primarily on civil and political rights. And the second reason is that this grounding of claims on civil and political rights is because international instruments creating (quasi-) adjudicatory bodies contain only civil and political rights, with few exceptions.¹⁰⁰ Therefore, the normative universe where LGBTIQ international jurisprudence has developed is that of civil and political rights, even if some cases have used equality to argue issues like social security rights.¹⁰¹ As a result, redistribution matters are also largely off the table in this article's sample, and that itself is one of the distorting effects of litigation to pursue rights in international law.

This section uses litigation specifically concerning LGBTIQ rights to highlight different (and sometimes contradictory) goals that can be advanced through specific rights. I exclude instruments for specific historically disadvantaged groups¹⁰² since they are not necessarily

99. See generally Lucas Lixinski, *Mechanisms of Systemic Change in Regional Human Rights Courts: Swinging the Pendulum Between Legitimacy and Impact*, 8 CAMBRIDGE INT'L L. J. 60 (2019).

100. Those being the ACHPR, and the International Committee on Economic, Social and Cultural Rights, which under a protocol to the International Covenant on Economic, Social and Cultural Rights is now empowered to hear individual complaints. See International Covenant on Economic, Social and Cultural Rights (hereinafter ICESPR), Dec. 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 368; Optional Protocol to ICESPR, Dec. 10, 2008, G.A. Res. 63/117.

101. *Duque v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 310 (Feb. 26, 2016).

102. Examples include: International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter ICERD), Dec. 21, 1965, 660 U.N.T.S. 195, at 47; Convention on the

available to emerging movements (unless one uses intersectionality). A key purpose of my intervention is to draw lessons for groups, like the LGBTIQ movement, that do not have yet achieved a degree of recognition in international human rights law that would lead to a specific instrument.

An important structural caveat: this section works on the assumption that we need to distinguish rights from the underlying goals that are tactically labeled as specific rights.¹⁰³ Therefore, this section is organized around goals, rather than rights, helping unpack the different rights that serve goals, and how privileging certain rights over others can lead to blind spots and unintended consequences. There are overlaps between the language of rights and goals in some respects (the goal of privacy is the right to privacy, for instance). Still, in other contexts, the goal is separate from the rights box, and it is precisely in those dissonances that we can best observe the unintended consequences of rights mobilization (for instance, decriminalization is also often translated in the language of the right to privacy). While those compromises are inevitable in strategic litigation and not unique to international human rights, they seem to be enhanced with respect to human rights, given the more limited list of rights that can be invoked (fundamentally restricted to the instrument that gives jurisdiction to the adjudicatory body in question),¹⁰⁴ as opposed to a much wider range of legal mechanisms and triggers domestically.

2. Privacy: To be Left Alone but also Invisible?

The earliest gay organization in the U.S. had both a privacy and a respect “plank,”¹⁰⁵ underscoring the importance of this tactic. The goal of privacy translates naturally into a human right protected across all key international instruments,¹⁰⁶ with the notable exception of the African Charter on Human and Peoples’ Rights. The omission of privacy in the African Charter was deliberate but unrelated to LGBTIQ rights, and some argue that despite the deliberate omission, the right can be implied.¹⁰⁷ In the instruments in which the right does appear, there is a remarkable

Elimination of All Forms of Discrimination against Women (hereinafter CEDAW), Dec. 18, 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980) at 193; Convention on the Rights of the Child (hereinafter CRC), Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1456 (1989); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (hereinafter CRMW), Dec. 18, 1990, 2220 U.N.T.S. 93, 30 I.L.M. 1517 (2003).

103. BOB, *supra* note 56, at 210.

104. Even when external treaties are used, they still need to be used only inasmuch as they enlighten an existing right in the principal instrument being applied. For a discussion, see Lucas Lixinski, *Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law*, 21 EUR. J. INT’L L. 585 (2010).

105. HIRSHMAN, *supra* note 26, at 37.

106. ACHR, art. 11; ECHR, art. 8; ICCPR, art. 17.

107. Murray & Viljoen, *supra* note 98, at 89.

similarity of tests and scope of application in many cases, with variation in scope only applying to cases where the limits of privacy or private life are stretched to new scenarios.¹⁰⁸

Privacy as a goal and as a right has been an important means of articulating a sphere beyond government interference with LGBTIQ practices when governments are intent on actively persecuting LGBTIQ people. Therefore, privacy and the invisibility it heralds can mean safety in contexts that are more oppressive to LGBTIQ people.¹⁰⁹ The tactic borrows perhaps most clearly from the women's rights movement, in that it translates into control over personal autonomy, the creation of a sphere of autonomy to the individual woman beyond the scrutiny of partners, and most notably, the state's impulse to regulate morality. However, it stands in tension with another goal of the women's rights movement, the piercing of the public/private distinction to allow for government interference to stop, prevent, and punish domestic violence.

Privacy is often characterized as the right to be left alone.¹¹⁰ Because of that, it has also come to mean the right to control one's own body (in the feminist movement, a key issue of control over the body is abortion rights). That connection was first developed in the context of women's rights, but it was quickly adopted to mean broader control over sexuality as well by the LGBTIQ movement.¹¹¹ The first Mardi Gras (1978) in Australia¹¹² had its politics characterized at least in part as being about control over the body.¹¹³ Therefore, it is to be expected that the early victories of the LGBTIQ movement have been about privacy.

108. Lucas Lixinski, *Comparative International Human Rights Law: An Analysis of the Right to Private and Family Life Across Human Rights "Jurisdictions,"* 32 NORDIC J. HUM. RTS. 99 (2014).

109. Michael O'Flaherty & John Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles*, 8 HUM. RTS. L. REV. 207, 214 (2008).

110. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

111. Of historical significance, note in this respect HIRSHMAN, *supra* note 26, at 3.

Being private, female relationships were extremely vulnerable to conform to a heterosexual norm. The combination of economic independence and social indifference that made a space for lesbian relationships in the late nineteenth century was more like a brief window into the future than the beginning of a social movement. Since women were never in command of the city streets the way men were, women would have to wait decades before they got a toehold in spaces like lesbian bars.

Therefore, the private has historically provided means of advancement through invisibility, but also precluded inroads into public life.

112. In Sydney, Australia, the Mardi Gras parade is the Gay Pride parade.

113. ROSS, *supra* note 29, at 88.

Key cases in this regard are *Dudgeon v. United Kingdom*¹¹⁴ and *Toonen v. Australia*,¹¹⁵ about the criminalization of sodomy in those two countries. (De)criminalization is discussed in the next section, but it is worth bearing in mind that in both of these cases, it was the articulation of a private sphere beyond government interference that made a case for the state to stop interfering (through criminal law) on practices undertaken by consenting adults in the privacy of their homes. The connection between sexual practices and privacy had the effect of reinforcing sexual relationships as being outside the basic structure of civil society—and also arguably privilege male homosexual acts over other parts of the LGBTIQ spectrum.¹¹⁶ In their construction as privacy, these victories meant protecting the right to be left alone, instead of a right to be accepted in society.¹¹⁷ These cases, as further discussed below, focus on practices, doing little to advance identity, even if they were a pivotal victory for the movement at the time.

Subsequent cases have discussed privacy in the LGBTIQ context as the protection of identity more broadly, particularly in the context of name changes for trans* persons. The Inter-American Court of Human Rights (IACtHR) Advisory Opinion 24 stated that the protection of private life is not limited to the right to privacy and that it includes dignity and identity more broadly.¹¹⁸ The IACtHR indicated that “the concept of private life includes aspects of physical and social identity, including the rights to personal autonomy, personal development and the right to establish and develop relationships with other human beings in the outside world.”¹¹⁹ This expansive view of privacy to mean identity more broadly is key in articulating LGBTIQ claims for recognition.

Finally, other cases also move the conversation away from practices undertaken in private (“private life”) to practices that have an impact on society more broadly (“family life”). The IACtHR articulated the right to family life connected not to the right to privacy, but a specific provision on the protection of the family in the American Convention on Human Rights (ACHR)¹²⁰ in *Atala Riffo v. Chile*.¹²¹ In this case, the majority of the IACtHR referred to a lesbian couple and their children as a family

114. *Dudgeon v. United Kingdom*, App. No. 7525/76 Eur. Ct. H. R., ECHR 5 [1981], Merits, Just Satisfaction, Oct. 22, 1981.

115. *Toonen v. Australia*, Commc’n No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (1994).

116. *But see* Suresh, *supra* note 12 (arguing that the “maleness” of the strategy does not matter because of its effects across society).

117. HIRSHMAN, *supra* note 26, at 315.

118. Also seen with respect to litigation in India. *See* Suresh, *supra* note 12.

119. OC-24, *supra* note 93, ¶ 87.

120. ACHR, Article 17.

121. *Atala Riffo & Daughters v. Chile*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 24, 2012).

that was entitled to protection¹²²—even if one judge disagreed with the configuration of the couple and their children as a “family,” advocating for a more “traditional” reading of family as the heterosexual couple and their children, and arguing that there was not enough consensus across the Americas to support defining a same-sex couple and their children as a family.¹²³ The language of consensus plays a pivotal role in LGBTIQ international rights litigation, as in other cases involving the evolution of social mores.

The consensus doctrine is a key defense in privacy cases involving LGBTIQ persons (or in cases involving LGBTIQ persons more broadly). This doctrine, first developed by the European Court of Human Rights (ECtHR),¹²⁴ is based on the idea that in matters where established human rights in a treaty interact with emerging rights or areas of social policy or morality, the adjudicating body may be guided by the consensus among member states, or a broader international consensus, in delineating the full scope of the right. Consensus becomes a source of legitimacy for the adjudicating body (when it can be identified), while also being a defense for the state (when there lacks consensus on an issue). In the area of LGBTIQ rights, consensus has been used on issues as varied as decriminalization, same-sex unions, registered partnerships, legal recognition of gender reassignment, and the age of consent for homosexual and heterosexual relations.¹²⁵

The consensus doctrine is often combined with the margin of appreciation doctrine in the European context, which is an articulation of subsidiarity, or the idea that local authorities are in a better position than international institutions to determine whether rights infringements have happened per allowed limitations.¹²⁶ Much like the consensus doctrine, however, there is a question as to whether it applies in other contexts.¹²⁷

122. *Id.* ¶¶ 172–78.

123. Partially Dissenting Opinion of Judge Alberto Pérez Pérez in the Judgment of Atala Riffo & Daughters v. Chile Inter-Am. Ct. H.R. (ser. C) No. 239, ¶¶ 18–24 (Feb. 24, 2012).

124. The leading monograph treatment of the topic is KANSTANTIN DZEHTSIAROU, *EUROPEAN CONSENSUS AND THE LEGITIMACY OF THE EUROPEAN COURT OF HUMAN RIGHTS* (2015).

125. Ragone & Volpe, *supra* note 15, at 480 (citing *Dudgeon v. United Kingdom*, App. No. 7525/76 Eur. Ct. H. R., ECHR 5 [1981], Merits, Just Satisfaction, ¶ 61 (Oct. 22, 1981); *Norris v. Ireland*, App. No. 10581/83 Eur. Ct. H. R., ¶ 46 (Oct. 26, 1988); *Schalk and Kopf v. Austria*, App. No. 30141/04 Eur. Ct. H. R., ¶ 63 (June 24, 2010); *Hämäläinen v. Finland* [GC], App. No. 37359/09 Eur. Ct. H. R., ¶ 74 (16 July 2014); *Vallianatos and others v. Greece*, Apps. Nos. 29381/09 and 32684/09 Eur. Ct. H. R., ¶ 91 (Nov. 7, 2013); *Christine Goodwin v. UK*, App. No. 28957/95 Eur. Ct. H. R., ¶ 84 (July 11, 2002); *L and V v. Austria*, Apps. Nos. 39392/98 and 39829/98 Eur. Ct. H. R., Judgment, ¶ 50 (Jan. 9, 2003).

126. Janneke Gerards, *Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights*, 18 HUM. RTS. L. REV. 495 (2018).

127. Amaury A Reyes-Torres, *El Principio de Igualdad y No Discriminación Como Límite al Margen de Apreciación en el Reconocimiento del Matrimonio Entre Personas del Mismo Sexo*, 29(4) AM. U. INT’L L. REV. 761, 763 (2014).

At any rate, the work that the margin of appreciation does for LGBTIQ rights, and social movements more generally, is to attempt to divorce the international from the domestic. But consensus plays a larger role in articulating the position of international human rights law as a mechanism for pressure onto domestic law and politics and is, therefore, a more useful concept for present purposes.

The language of family life, and particularly its evolution from private life, is more significant in the European context since it is built into the language of the right to private and family life in the European Convention on Human Rights (ECHR).¹²⁸ That use, however, is a double-edged sword. Specifically, the language of privacy can be (and has been) used to sidestep rights more grounded in citizenship, like marriage equality. In *Oliari v. Italy*, for instance, the ECtHR sidestepped a claim on the right to marry (Article 12 of the ECHR) in favor of a focus only on the right to private and family life (Article 8 ECHR).¹²⁹ Commentators praised the judgment for expanding the focus of LGBTIQ rights beyond just “private life,” including “family life,” which represented an advance compared with previous ECtHR case law.¹³⁰ To make the issue of marriage equality about “family” somewhat broadens the scope of privacy and adds marked public dimensions to it, so it is not a development to be overlooked, as it moves the issue from a negative sphere of rights towards positive obligations of the state.¹³¹ That said, it still sidesteps the issue of the right to marry, with a clearer public mandate, precisely as a means to contain the claim. Therefore, privacy as a legal tactic can become counterproductive, as it has a pigeonholing effect on the claims of the historically disadvantaged group represented by the social movement and makes their existence severable from that of mainstream society by encasing their identity as “practices” that happen “in private.” That is what Lelis and Galil have termed “monochromatic” international law, unable to accommodate the diversity of colors in the LGBTIQ rainbow flag and rendering diversity invisible by the focus on privacy.¹³²

LGBTIQ identity is often privatized for international rights litigation, alongside it being essentialized, victimized, and made respectable.¹³³ As Ammaturo put it, one of the effects of these labels is to construct “a

128. ECHR, art. 8.

129. *Oliari and Others v. Italy*, App. Nos. 18766/11 and 36030/11 Eur. Ct. H. R., (July 21, 2015) (cited in Ragone & Volpe, *supra* note 15, at 460–61).

130. Ragone & Volpe, *supra* note 15, at 472–73. They are also wary of the “privatization of homosexuality” that is done in the case, though.

131. *Id.* at 482.

132. Lelis & Galil, *supra* note 10, at 291; *But see* Suresh, *supra* note 12 (arguing that in domestic litigation in India the meaning of privacy is distinct, and carries with it a public sphere rendering, effectively moving privacy away from practices and towards identity).

133. Ammaturo, *supra* note 81, at 576.

domesticated homosexual subject whose characteristics are presented as being immutable, whose desires are to be sheltered from the public gaze, who appears as a passive subject of rights rather than an active actor, and whose behaviors do not overtly offend extant public (heteronormative) morals.”¹³⁴ Further, privacy and its control effectively create pathways for the control of capital flows connected to intimate relationships, complicating the constitution of identity in ways that are difficult, if not impossible, to capture in the context of a right like privacy or even family life.¹³⁵

Nevertheless, the push for privacy played an important role in pursuing LGBTIQ objectives in international human rights law. A key victory was the decriminalization of same-sex conduct, which, because of its idiosyncratic dimensions, deserves a separate analysis.

3. (De)Criminalization of Conduct: Becoming a Statistic “Does not Imply Approval”

The relationship between LGBTIQ rights advocacy and criminal law pursues two different avenues: the decriminalization of sexual practices; and the criminalization of attacks against LGBTIQ persons. Decriminalization is one of the normal early steps in LGBTIQ contexts, and it is where the political battle for UN standard-setting has initially focused,¹³⁶ alongside de-Westernizing the debate and getting more states from the Global South to spearhead or co-sponsor initiatives.¹³⁷ Decriminalization is a key challenge, but also one that is treated with relatively less systematicity by (quasi-)adjudicatory bodies.¹³⁸

Decriminalization has historically been the specific target of test cases domestically, an important part of rights mobilization strategies. Linda Hirshman describes a case in which three couples (a gay couple, a lesbian couple, and a straight couple) went to the police and asked to be arrested because they had engaged in sodomy. The police refused to arrest them, prompting the three couples to get a statement from the local District Attorney saying the office, as a matter of policy, does not prosecute private sexual acts. Unlike the use of privacy described above that aligns with control over the body and feminist tactics in this respect, the use of privacy to pursue decriminalization aligns with tactics pursued in the race rights context. As Hirshman put it, “[these three couples], like much of

134. *Id.*

135. For this critique, see HARPER, *supra* note 40, at 20–21; see also YASMIN NAIR, *Against Equality, Against Marriage: An Introduction*, in AGAINST EQUALITY: QUEER REVOLUTION NOT MERE INCLUSION 15, 20 (Ryan Conrad ed., 2014) (arguing that “the family is the best way to advance capitalism, as the base unit through which capitalism distributes benefits”).

136. MARTEL, *supra* note 15, at 153.

137. *Id.* at 158.

138. Gerber & Gory, *supra* note 53, at 407.

American social history since the sit-in at the Greensboro lunch counter, worked by forcing the establishment to enforce its discriminatory laws—or to back down.”¹³⁹ The alignment with race rights underscores a public element to the strategy, but, when translated to international law and particularly privacy, that public element gets translated into prongs of the proportionality test (that the restriction is required by law and in pursuance of pressing social objectives) to underscore the inexistence of a pressing social objective that would require discrimination against LGBTIQ practices.

Decriminalization of LGBTIQ sexual conduct has thus often relied on a combination of the rights to privacy and non-discrimination. A classic example is *Toonen v. Australia*, in which the Human Rights Committee (HRC), in 1994, used the right to privacy in the International Covenant on Civil and Political Rights (ICCPR) to make a case for decriminalizing sodomy in the Australian state of Tasmania.¹⁴⁰ One of the Committee Members issued a separate opinion in the case, though, arguing that the case should have been decided on non-discrimination grounds,¹⁴¹ reflecting subsequently in concluding observations of the HRC on decriminalization, connecting privacy and non-discrimination.¹⁴²

The focus on privacy and private life in the case law of the ECtHR underscores a tension between privacy and morality, which, at least in *Dudgeon v. UK* (about the decriminalization of sodomy), gets resolved as tolerance,¹⁴³ with the ECtHR stating that decriminalization “does not imply approval.”¹⁴⁴ A key objective of strategic litigation thus centers on focusing on LGBTIQ sexual practices as based on relationships just like heterosexual bonds, and often even avoiding sexual terminology altogether.¹⁴⁵ That said, Ammaturo has argued that this logic only worked to the extent the victims portrayed themselves as precisely that. In other contexts, in which those engaging in the sexual practice failed to portray themselves as victims, cases failed (since they were then seen as perpetrators of sexual acts onto others).¹⁴⁶ Therefore, being able to

139. HIRSHMAN, *supra* note 26, at 151.

140. *Toonen v. Australia*, Comm’n. No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (1994).

141. Individual opinion by Mr. Bertil Wennergren under rule 94, paragraph 3, of the Human Rights Committee’s rules of procedure, concerning the Committee’s Views on communication No. 488/1992 (*Nicholas Toonen v. Australia*).

142. Dominic McGoldrick, *The Development and Status of Sexual Orientation Discrimination Under International Human Rights Law*, 16 HUM. RTS. L. REV. 613, 628 (2016).

143. Ammaturo, *supra* note 81, at 580.

144. *Dudgeon v. United Kingdom*, App. No. 7525/76 Eur. Ct. H. R., ECHR 5, ¶61 [1981].

145. CARPENTER, *supra* note 9, at 189 (on the comparison to heterosexual relationships) and at 193–94 (on avoidance of sexual terminology).

146. Ammaturo, *supra* note 81, at 582 (citing *Laskey, Jaggard and Brown v. UK*, Apps. No. 21627/93; 21628/93; 21974/93 Eur. Ct. H. R., Feb. 19, 1997).

portray oneself as a victim helps decriminalize conduct. Likewise, it also aids in helping LGBTIQ issues move from “practices” in isolation and towards “identity,” an important part of the move from rights based on privacy to rights of participation in public life.

LGBTIQ advocates’ move to decriminalize conduct is, therefore, an important part of legal mobilization strategies. It means preventing the state from enforcing laws that have no effect other than to oppress the historically disadvantaged group. Part of the insight is that LGBTIQ conduct is effectively LGBTIQ identity.¹⁴⁷ But criminal law enforcement is focused primarily on the negative obligations of the state, which, although historically the core of civil and political rights, no longer mean the full picture. Rather, there are positive obligations upon states that also follow from international human rights law. To prosecute harm experienced by individuals, whether at the hands of state agents or private parties, is a key part of these positive obligations.

In the context of criminal law, compliance with positive obligations means criminalizing actions against LGBTIQ persons. Much like decriminalization, there is an alignment here with the race rights movement, particularly with respect to the push for criminalization of hate crimes.¹⁴⁸ Another aspect of criminalization aligns with women’s rights advocates’ move to criminalize marital rape and other forms of domestic violence against women, which meant bringing private life “into the world of democratic principles.”¹⁴⁹ The alignment with women’s rights in this instance has the important effect of piercing the private sphere and underscoring its unintended consequences. While it is generally good that the state does not interfere in private relations, it also does not mean that the state should be able to wash their hands clean at the expense of people whose oppression often happens in private.¹⁵⁰

That said, there has also been a backlash against the over-use of criminal law in the area of women’s rights as a means of limiting and controlling conduct in the name of paternalistic protections that ignore broader claims for rights, economic power, and the unintended consequences of criminalization and incarceration, mechanisms unlikely to get to the root causes of rights violations.¹⁵¹ Similar critiques have emerged in the context of LGBTIQ rights. Specifically, radical queer authors have asserted that the focus on criminalization for crimes against LGBTIQ persons is unhelpful because: (1) jails are full not of dangerous

147. CARPENTER, *supra* note 9, at 109.

148. HIRSHMAN, *supra* note 26, at 274–75.

149. *Id.* at 238.

150. See generally Karen Engle, *After the Collapse of the Public/Private Distinction: Strategizing Women’s Rights*, 25 STUD. TRANSNAT’L LEGAL POL’Y 143 (1993).

151. Michelle Madden Dempse, *Sex Trafficking and Criminalization: In Defense of Feminist Abolitionism*, 158 U. PA. L. REV. 1729 (2010).

people, but of disenfranchised people the LGBTIQ community should be aiming to help; (2) most violence happens domestically, not on the streets (the focus of hate crimes legislation); (3) that the more important violence to focus on is structural violence through the market; (4) that prisons are places where physical violence is likely to be perpetrated, not redressed; and (5) that criminalization feeds a criminal justice system that has itself caused significant damage to LGBTIQ communities.¹⁵² Further, the reliance on criminal law relies on paternalistic protection by the state, which is inconsistent with the goals of autonomy of many LGBTIQ advocates.¹⁵³

For hate crime legislation, while there is no specific international human rights litigation that could be found, they present an important lesson that counters some of the individualistic critiques of international human rights strategies and therefore are worth noting. The LGBTIQ movement's tactic domestically has been to make the exercise less one of adjudication and more a technical effort for the collection of statistics (alongside Jewish organizations), pushing the LGBTIQ rights questions to the background.¹⁵⁴ As effective as it was outside of international human rights law, this tactic also depersonalizes and dehumanizes the victims, being one reason why policies like 'Don't Ask, Don't Tell' in the U.S. went ahead: LGBTIQ persons were not seen as humans, but rather as cogs in the military mechanism. It was only the reengagement of very individualized pain and suffering that allowed for policies based on a collective group to be put to rest.¹⁵⁵ Therefore, even if international human rights law and adjudication can be accused of demanding the individualization of cases at the expense of the goals of an entire movement,¹⁵⁶ this exercise of individualization can also render the LGBTIQ movement visible and relatable in powerful ways for legal mobilization.

In both these forms of engagement with criminal law, the move to the public sphere is even more pronounced than in privacy rights' articulation of the right to "family life," or private life as identity. Criminal law's existence and enforcement shifts from being part of a state defense towards it being the direct implementation of international human rights obligations, which also helps drag these concerns to the center of

152. DEAN SPADE, *Their Laws Will Never Make Us Safer*, in *AGAINST EQUALITY: QUEER REVOLUTION NOT MERE INCLUSION* 165, 167–69 (Ryan Conrad ed., 2014); see also JASON LYDON, *A Compilation of Critiques on Hate Crimes Legislation*, in *AGAINST EQUALITY: QUEER REVOLUTION NOT MERE INCLUSION* 177 (Ryan Conrad ed., 2014).

153. LYDON, *supra* note 152, at 180.

154. HIRSHMAN, *supra* note 26, at 273.

155. *Id.* at 285.

156. For a critique of individualization in the LGBTIQ crimes legislation context, see YASMIN NAIR, *Why Hate Crime Legislation is Still Not a Solution*, in *AGAINST EQUALITY: QUEER REVOLUTION NOT MERE INCLUSION* 199, 203 (Ryan Conrad ed., 2014).

international human rights law adjudication. There are instances, however, in which the articulation of visibility does not rely on a connection to criminal law.

4. Presence in Public Life: The Limits of Visibility

Insertion into public life is key to move LGBTIQ causes from being about conduct and towards identity more broadly. Visibility has been central in other social movements, all of whom at one point or another have made claims to the public arena, with suffrage in the race and gender context being particularly powerful examples. Historically, though, these two groups have been at odds with one another, often seeking to gain suffrage and a presence in public life at the expense of one another.¹⁵⁷

In the LGBTIQ context concerning public life, at stake is the visibility of LGBTIQ persons and claims. But this tactic, like the ones involving privacy and the engagement with criminal law, requires victimization to make the LGBTIQ person more fragile and therefore “palatable” or acceptable to society at large; if you are fragile, there is no reason for people to fear you and some reason for people to pity you. Likewise, this tactic also requires respectability,¹⁵⁸ which has been an ongoing issue in the LGBTIQ movement, both catalyzing rights and alienating subgroups and allies from other social movements. The move reflects, in part, a generational shift in the LGBTIQ movement, too. In Australia, for instance, Liz Ross identified a tension in tactics between privacy (taken up by older LGBTIQ persons) and censorship (taken up by students and other younger persons).¹⁵⁹ Therefore, the assertion of LGBTIQ identity in public life is a relatively new entrant to international rights tactics in this movement.

Nonetheless, there are some promising examples of the insertion into public life being used to promote LGBTIQ identity positively. In *Fedotova v. Russian Federation*,¹⁶⁰ the HRC engaged with the right to freedom of expression in reaction to Russia’s domestic law prohibiting “propaganda of homosexuality.” Specifically, it was of the view that the state had violated the rights of Ms. Fedotova in expressing views publicly supportive of homosexuality by displaying posters near a secondary

157. For a U.S.-centric discussion, see LAURA E. FREE, *SUFFRAGE RECONSTRUCTED: GENDER, RACE, AND VOTING RIGHTS IN THE CIVIL WAR ERA* (2015). The same tensions occurred in South Africa, as documented by Cheryl Walker, *The Women’s Suffrage Movement: The Politics of Gender Race and Class*, SOUTH AFRICAN HISTORY ONLINE: TOWARDS A PEOPLE’S HISTORY, <https://www.sahistory.org.za/archive/womens-suffrage-movement-politics-gender-race-and-class-cheryl-walker>.

158. Ammaturo, *supra* note 81, at 584.

159. ROSS, *supra* note 29, at 44.

160. *Fedotova v. Russian Federation*, CPR/C/106/D/1932/2010 Hum. Rts. Comm., Views (1932/2010).

school building.¹⁶¹ In other words, cases like *Fedotova* protect a public side to LGBTIQ identity, even in the face of legislation whose purpose is to keep LGBTIQ identity restricted to private practices.

The jurisprudence on marriage equality, too, speaks to the public visibility of LGBTIQ identity. While it revolves primarily around the right to private and family life, and only in few instances it is directly connected to rights detached from privacy, the recognition of the right to marry for LGBTIQ persons is a key moment of public endorsement of LGBTIQ identity. On this matter, views still differ across human rights (quasi-)adjudicatory bodies, with the IACtHR having the clearest pro-marriage equality position, and as part of identity and a combination of privacy and protection of the family.¹⁶² In the European context, there is a concerted effort to move litigation away from private life and towards more public rights like the right to marry itself.¹⁶³

The HRC's jurisprudence seems at the moment to be the least resolved on this matter. In *Joslin v. New Zealand*,¹⁶⁴ the HRC narrowed down the scope of the right to marry in the ICCPR¹⁶⁵ only to opposite-sex couples, thus decoupling an important element of public life from LGBTIQ causes, much like the ECtHR. Subsequent cases, however, have challenged those views. *G v. Australia*¹⁶⁶ involves a trans* woman who stayed married to her female partner and sought to have her documents corrected to reflect her gender identity. The HRC condemned Australian authorities' refusal to do so, based on her right to privacy¹⁶⁷ and the right to non-discrimination.¹⁶⁸ Another case involving Australia was about whether Australian authorities needed to grant a divorce to a same-sex couple married in Canada, where same-sex marriage was recognized before Australia.¹⁶⁹ The denial of access to divorce was argued based on procedural rights¹⁷⁰ and the right of non-discrimination, but the HRC disregarded the claims under procedural rights. In other words, discrimination is still treated as being a secondary rights claim which ignores procedural rights arguments (the substantive or primary claim in

161. McGoldrick, *supra* note 142, at 630.

162. OC-24, *supra* note 94, ¶¶ 200–18.

163. ECHR, art. 12. See also Frances Hamilton, *The Case for Same-Sex Marriage Before the European Court of Human Rights*, 65 J. OF HOMOSEXUALITY 1582 (2018).

164. *Joslin and others v. New Zealand*, Merits, Commc'n. No. 902/1999, U.N. Doc. CCPR/C/75/D/902/1999, 10 IHRR 40, IHRL 1719 (UNHRC) (July 17, 2002).

165. ICCPR, art. 23(2).

166. *G v. Australia*, Merits, Commc'n. No. 2172/2012, U.N. Doc. CCPR/C/119/D/2172/2012 (Mar. 17, 2017).

167. ICCPR, art. 17.

168. ICCPR, art. 26.

169. *C v. Australia*, Merits, Commc'n. No. 2216/2012, U.N. Doc. CCPR/C/119/D/2216/2012 (Mar. 28, 2017).

170. ICCPR, art. 14.

this case).¹⁷¹ Therefore, the marriage equality debate in international human rights litigation is still largely contained to one specific practice (marriage), rather than LGBTIQ identity more broadly, and connections to identity are still made largely on the basis of rights that instinctively insulate LGBTIQ identity. There are thus still significant inroads for LGBTIQ advocates to break away from the self-made contraptions of the right to private life, and obtain broader, political, recognition of LGBTIQ claims.

5. Accommodation of Difference and (Non)Discrimination: To be the Same or Otherwise

Claims based on difference or sameness speak not only to issues like marriage equality but more broadly to the matter of whether the purpose of (international) human rights law advocacy is to carve out special rights or to identify mechanisms of sameness. Unlike privacy, non-discrimination is meant to entitle the group to “full and equal respect.”¹⁷² That said, before international bodies like the ECtHR, non-discrimination is something of a blind spot, as it requires systemic discrimination that in some instances reaches the threshold of criminal conduct, which effectively turns the right to non-discrimination into a criminalization tactic, and consequently turns identity into statistics, much like the criminalization tactic discussed above.¹⁷³

There is an assumption, particularly in the area of marriage, that a key objective of LGBTIQ people is to achieve equal rights.¹⁷⁴ The fight for marriage equality draws many parallels with earlier efforts in the race rights contexts for the right to marry as well,¹⁷⁵ which includes unintended consequences. One of them is bringing the state to bear on the regulation of private conduct (therefore, in tension with privacy goals). Another downside is that in the LGBTIQ context, at least the focus on marriage equality has meant for some critics a further “domestication” of LGBTIQ persons, and a privileging of white middle-class interests over the goals of further marginalized LGBTIQ communities.¹⁷⁶ As put by one queer radical author, “Gay marriage and voting are symbolic gestures that

171. For commentary on these cases, see Oscar I Roos & Anita Mackay, *A Shift in the United Nations Human Rights Committee's Jurisprudence on Marriage Equality? An Analysis of Two Recent Communications from Australia*, 42 UNSW L. J. 747 (2019).

172. Murray & Viljoen, *supra* note 98, at 91.

173. Ruth Rubio-Marin & Mathias Möschel, *Anti-Discrimination Exceptionalism: Racist Violence Before the ECtHR and the Holocaust Prism*, 26 EUR. J. INT'L L. 881 (2015).

174. KAPLAN, *supra* note 32, at 66.

175. For this history, see generally KATHERINE FRANKE, *WEDLOCKED: THE PERILS OF MARRIAGE EQUALITY* (2015).

176. For a collection of essays, see *AGAINST EQUALITY: QUEER REVOLUTION NOT MERE INCLUSION* (Ryan Conrad ed., 2014).

reinforce structures while claiming to reconfigure them.”¹⁷⁷ And, while I do not dispute the importance of this assertion, it is also worth noting the possible unintended consequences of arguing on the grounds of non-discrimination, and what gets missed by focusing on a specific construction of equality.

Non-discrimination, or the right to be treated the same, speaks not only to the private life of LGBTIQ persons but also to other forms of public discrimination, such as job losses incurred by LGBTIQ persons whose status was discovered.¹⁷⁸ But here, like in the discussion on special rights above, there remains a tension between rights gains and (in)visibility. After all, in instances of job loss, one needed to have a job, to begin with, and it was only LGBTIQ people who could “pass” as heteronormative that would gain employment. Therefore, the language of non-discrimination in this context privileges a specific type of LGBTIQ identity, that is (under-) performed for the sake of the rest of society, at the exclusion of certain segments of the LGBTIQ spectrum itself.

Other social movements have used equality and non-discrimination in potentially more radical ways. In the context of Indigenous rights, for instance, advocates have used the prohibition of discrimination to mean not a duty of the state to promote equality across the board, but in fact, to accommodate cultural differences.¹⁷⁹ International human rights law, therefore, contains within the possibility of promoting substantive equality that challenges essentialized identities in favor of thick descriptions of difference. The problem seems to be that LGBTIQ cases have fallen short of tapping into that potential.

Accommodation of difference is, therefore, one area in which constructions of equality and non-discrimination largely fail LGBTIQ victims. As indicated above, in the ECtHR context, the identity of LGBTIQ claimants is often essentialized and made respectable.¹⁸⁰ That often means that, particularly for trans* persons, their identity ends up erased in favor of biology (the transsexual who undergoes reassignment surgery is preferred),¹⁸¹ and a specific heteronormative understanding of

177. ERIC A STANLEY, *Marriage is Murder: On the Discursive Limits of Matrimony*, in *AGAINST EQUALITY: QUEER REVOLUTION NOT MERE INCLUSION* 27, 29 (Ryan Conrad ed., 2014).

178. ROSS, *supra* note 29, at 45.

179. *Yakye Axa Indigenous Community v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 51 (June 17, 2005); see also *López Álvarez v. Honduras*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 141 (Feb. 1, 2006) (using this obiter dicta from *Yakye Axa* to make a case for the accommodation of Indigenous languages in prison).

180. Ammaturo, *supra* note 81, at 576.

181. But the case law has evolved, both in the European and Inter-American contexts. See DAMIAN A GONZALEZ-SALZBERG, *A Queer Approach to the Advisory Opinion 24/2017 on LGBT Rights*, in *RESEARCH METHODS FOR INTERNATIONAL HUMAN RIGHTS LAW: BEYOND THE TRADITIONAL PARADIGM* 107, 110 (Damian A Gonzalez-Salzberg & Loveday Hodson eds., 2019).

what it means to be trans* (an assumption that trans* people are heterosexual).¹⁸² In other words, accommodation of identity can still be problematic in the rather fixed categories of international human rights law, at least when some assumptions about the aspirations of LGBTIQ people (in this case, sameness) are made.

In *Duque v. Colombia*,¹⁸³ a gay man was denied access to public benefits following the death of his partner, making the case hinge on non-discrimination in access to rights. The IACtHR decided the case by drawing a definition of discrimination from instruments on race and gender.¹⁸⁴ The court also derived equality from human dignity, thus rendering it a fundamental norm of international human rights law.¹⁸⁵ After reaffirming the finding in *Atala Riffo v. Chile* that LGBTIQ status is a protected category under the norm prohibiting discrimination,¹⁸⁶ the court drew on domestic practices across the region (so, consensus reasoning) to support the proposition that social security benefits for same-sex couples should be guaranteed under anti-discrimination law.¹⁸⁷ The decision has been criticized for being pursued despite changes to Colombian domestic law before the case reaching the IACtHR that rendered the case largely moot.¹⁸⁸ But it is important in that it reaffirms Atala Riffo's proposition that the lack of regional consensus is not a sufficient reason to deny LGBTIQ persons the full gamut of human rights.¹⁸⁹

Another important case in the Inter-American system is *Flor Freire v. Ecuador*,¹⁹⁰ which returns the issue of discrimination to (one aspect of) the private sphere. In this case, a military police officer was allegedly caught engaged in sexual acts with another man and disciplined and ultimately dismissed. The state of Ecuador, taking into account the *Atala Riffo* judgment, apologized to the victim and proceeded to make reparations. It, however, refused to acknowledge its responsibility for the breach of international law, which forced the IACtHR to issue a judgment

182. For this critique, see Damian A. Gonzalez-Salzberg, *The Accepted Transsexual and the Absent Transgender: A Queer Reading of the Regulation of Sex/Gender by the European Court of Human Rights*, 29 AM. U. INT'L L. REV. 797, 819 (2014).

183. *Duque v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 310 (Feb. 26, 2016).

184. *Id.* ¶ 90 (citing ICERD and CEDAW).

185. *Id.* ¶ 91.

186. *Id.* ¶¶ 104–05.

187. *Id.* ¶¶ 112–19.

188. Jorge Contesse, *Sexual Orientation and Gender Identity in Inter-American Human Rights Law*, 44 NC. J. INT'L L. 353, 374 (2019).

189. *Duque v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 310, ¶ 123 (Feb. 26, 2016) (citing *Atala Riffo & Daughters v. Chile*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 92 (Feb. 24, 2012)).

190. *Flor Freire v. Ecuador*, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 315 (Aug. 31, 2016).

on the merits.¹⁹¹ The IACtHR used the case as a platform to discuss the matter of discrimination ‘by perception,’¹⁹² as well as the ties between discrimination and criminalization of conduct (in this case, the disciplinary proceedings Mr. Flor Freire had to undergo).¹⁹³ But the IACtHR was also asked to address a third key tactic of LGBTIQ rights, and this time turned against LGBTIQ identity. Specifically, the court was asked to rule on whether the victim being accused of being gay (and that being grounds for his dismissal) was a violation of his honor (protected in the same provision of the ACHR that covers privacy).¹⁹⁴ The court treaded carefully to say that, because of the consequences of the imputation of LGBTIQ identity (the victim’s dismissal and disciplinary proceedings), his honor had been violated.¹⁹⁵ But, in doing so, the IACtHR embraces in the area of non-discrimination also an assumption that LGBTIQ persons have to be respectable, and that to be identified as LGBTIQ can in itself be otherwise.

Flor Freire v. Ecuador, therefore, brings several of the analytical strands of LGBTIQ international human rights adjudication together and in tension with one another. The case is simultaneously about non-discrimination, criminalization, and honor and privacy, while also connecting to the problems of “passing” and “freeriding,” discussed above. All these rights are meant to be self-reinforcing and protective of LGBTIQ identity. Still, they have the effect of subordinating the prohibition of non-discrimination to LGBTIQ identity that is respectable, that “passes,” and even admitting that the suggestion of LGBTIQ status can be a violation of human rights. In other words, LGBTIQ identity is acceptable and even celebrated, but only as long as it does not challenge the status quo of non-LGBTIQ persons. Non-discrimination becomes sameness, rather than the accommodation of difference.

As a counterpoint, however, the IACtHR’s Advisory Opinion 24 challenges a lot of assumptions in international human rights LGBTIQ jurisprudence. It starts by unpacking the binaries of heterosexual v. homosexual, indicating that LGBTIQ identity is “a conceptual dynamical eminently changeable and in constant revision.”¹⁹⁶ Because of that, classifying LGBTIQ persons in essentializing ways should be carefully avoided, and the court’s opinion should be read as using these conceptual categories in broad terms and avoiding reductionist categorizations.¹⁹⁷ In doing so, the court challenges many of the assumptions about LGBTIQ

191. Contesse, *supra* note 188, at 378.

192. *Flor Freire v. Ecuador*, Inter-Am. Ct. H.R. (ser. C) No. 315, ¶ 122 (Aug. 31, 2016).

193. *Id.* ¶ 123.

194. ACHR, art. 11.

195. *Flor Freire v. Ecuador*, Inter-Am. Ct. H.R. (ser. C) No. 315, ¶¶ 155–58 (Aug. 31, 2016).

196. OC-24, *supra* note 94, ¶ 31.

197. *Id.*

identity discussed in the jurisprudence so far and widens the scope of possible claims. The IACtHR also discusses the scope of discrimination as being based on official and unofficial policies alike,¹⁹⁸ and coming from state and non-state sources.¹⁹⁹ The court thereby opens the door for the broader recognition of LGBTIQ identity in its own terms, trying to do away with the reference point of non-LGBTIQ identity and standards of respectability. This opinion, the current high watermark of LGBTIQ international rights jurisprudence, can be highly influential in undoing a lot of the traps of this social movement, and can be useful in other social movement contexts as well in dispelling the illusion that the key aspiration of social movements is sameness and “integration” into a perceived “normal” or “mainstream” society. In other words, this opinion’s take on equality and non-discrimination, alongside the complexity of LGBTIQ identities, can be a powerful leverage to unlock more radical possibilities of international human rights adjudication for social movements.

While the move away from practices and towards identity is very welcome, there are still contexts in which these rights come as luxuries, and the primary focus of advocates is on protecting the life of LGBTIQ persons. Therefore, the next subsection discusses the right to life as encompassing overarching goals of safety and beyond, particularly its latest iterations that attempt to imbue it with identity-serving elements that may present a better alternative to LGBTIQ advocates than rights based on privacy.

6. Life and Physical Integrity: Dignified Life and the Public LGBTIQ Body

The category of “life” as legally protected is an umbrella for a range of claims, and it is particularly important in contexts in which the lives of LGBTIQ persons are threatened by oppressive state and non-state actors. The right to life is useful in contexts in which the lives of LGBTIQ people are threatened, particularly if these violations can be made out to be part of a broader pattern of discrimination as a result of which LGBTIQ people are targeted simply for being LGBTIQ, drawing parallels from international jurisprudence on femicide.²⁰⁰ Advisory Opinion 24 of the IACtHR also recognizes the connection to the right to life and physical integrity,²⁰¹ and particularly the psychological integrity of LGBTIQ persons.²⁰²

198. *Id.* ¶ 39.

199. *Id.* ¶ 40.

200. *See generally* González et al. (“Cotton Field”) v. Mexico, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205 (Nov. 16, 2009).

201. OC-24, *supra* note 94, ¶ 47.

202. *Id.* ¶ 48.

A key advantage of using rights like the right to life and physical integrity, compared to rights like private life, non-discrimination, and even freedom of expression, is that the former two rights do not admit limitations as readily as the latter. In other words, an interference with the right to life puts a heightened burden on the state to justify the interference, even if the threshold for an interference to be characterized is harder. The right to life and physical integrity, therefore, bypass arguments about state discretion and the lack of a regional consensus more easily than other rights used by international human rights advocates.

The Human Rights Committee has recently interpreted the right to life in the ICCPR²⁰³ to mean not only the absence of the arbitrary loss of life but also the right “to enjoy a life with dignity.”²⁰⁴ That view means an expansive interpretation of the right to life, which results in the right to life not being absolute.²⁰⁵ Specifically, deprivation of life is considered to violate international human rights law if it is arbitrary, and the test for arbitrariness involves elements of “inappropriateness, injustice, lack of predictability, and due process of law [...] as well as elements of reasonableness, necessity, and proportionality.”²⁰⁶

The HRC put particular emphasis on the need for states to adopt special measures to protect the right to life of “persons in situations of vulnerability,” which expressly include LGBTIQ persons.²⁰⁷ Likewise, the right to life is connected to the prohibition of discrimination in international human rights law, again specifically for LGBTIQ persons.²⁰⁸ In broadening the scope of the right to life to include a dignified life and connecting it to non-discrimination, therefore, the General Comment opens a new avenue for LGBTIQ advocates to pursue cases that, while achieving many desirable outcomes from a legal advocacy standpoint (clear, individualized victimhood connected to a context of discrimination, limited defenses available to the state), does not suffer from the discursive biases of rights like privacy, or even non-discrimination in isolation.

The right to physical integrity can also be useful in this connection, not only because it feeds into the right to life, but because it has autonomous dimensions. It can be interpreted to include both physical and mental suffering, and it is particularly relevant in articulating

203. ICCPR, art. 6.

204. General Comment No. 38 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, Hum. Rts. Comm., U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018), ¶ 3.

205. *Id.* ¶ 10.

206. *Id.* ¶ 12.

207. *Id.* ¶ 23.

208. *Id.* ¶ 61.

reparations to victims, both at an individual level and in terms of guarantees of non-repetition capable of achieving systemic reform and legislative change at the domestic level. Further, the right to physical integrity is especially relevant for trans* and intersex advocates, with respect to surgical interventions implemented ostensibly to “correct” sex deviations that need no correcting.²⁰⁹ Thus, while focused primarily on the physical body and the biological existence of LGBTIQ persons, there are important identity-driven ripple effects of litigation based on the right to life and physical integrity that are worth exploring further in litigation.

The discussion above of different rights tactics has underscored the potentials and pitfalls of multiple rights, some of which serve multiple functions concerning LGBTIQ international human rights law advocacy and rights mobilization. It also shows how, in practice, tactics gleaned from other social movements have been replicated and built upon by LGBTIQ advocates. The next section discusses whether and how do these findings for LGBTIQ persons and their rights translate back to thinking about social movements in other (particularly emerging) contexts.

II. A ROADMAP FOR INTERNATIONAL HUMAN RIGHTS LITIGATION?

This Article has focused thus far on how different social movements flowed into the LGBTIQ movement as a relative newcomer to the scene, while simultaneously exploring the trade-offs of pursuing goals framed in the language one right over other rights and identity claims—a point of confluence. This section focuses on what the LGBTIQ movement, and its legal mobilization strategies in international human rights (quasi-) adjudication, can do as their ideas flow onto other, emerging movements. For example, trans* advocates have argued that they identify themselves with groups such as disability rights,²¹⁰ meaning there are avenues for social movements beyond LGBTIQ to learn from and intersect with this movement, despite its specificities pointed out above.

Choosing the path of human rights is not always a clear choice. Frédéric Martel, in the LGBTIQ context, pointed out a difference between “hard” and “soft” defenses of human rights, depending on the context. Specifically, certain contexts are more likely to respond to “hard” human rights arguments based on LGBTIQ identity and values and rights. These are contexts that are riper for LGBTIQ rights reform, or where resistance is relatively smaller (usually spaces where criminalization is no longer an issue, or at least criminal laws on the books are not enforced). In contexts where there is more resistance, a “soft” human rights approach, based on culture, communication, and

209. Tony Briffa, *Intersex Surgery Disregards Children's Human Rights*, 428 NATURE 695 (2004); Kirsten Sandberg, *The Rights of LGBTI Children Under the Convention on the Rights of the Child*, 33 NORDIC J. HUM. RTS. 337 (2015).

210. STRYKER, *supra* note 1, at xii.

isolated LGBTIQ practices, is more appropriate, according to him.²¹¹ But, if legal mobilization through international human rights (quasi-) adjudication is on the table, then there are a few issues to take into account.

Martel's categorization is useful in thinking about sequencing. While other authors have written about it,²¹² I wish to resist being particularly prescriptive, since I am not focusing on one specific minority for this section. Nonetheless, it is important to note the difference Martel makes between identity and practices, and how practices are upheld at an earlier stage in the fight for the rights of this minority, to only then focus on identity issues. There seems, therefore, to be a flow from the private towards the public: an initial step is to think of protecting practices undertaken in private, to only then focus on the broader identity of the affected minority, which speaks more broadly to issues of belonging, citizenship, and substantive equality and non-discrimination. One of the risks of the move from practices to identity is that, in the context of international human rights adjudication, it may lead to the essentialization of identity, much in the same way international adjudication of Indigenous rights has done, under the banner of "strategic essentialism."²¹³ That said, essentialization, while it must be resisted in favor of thick descriptions, is also to a certain extent the price to pay for engagement with the human rights system, and will always be there in some form. The problem in this respect is more one with the forums and forms of international human rights (or even litigation more broadly) than with the movements themselves.

The LGBTIQ movement's engagement with international human rights instruments and processes has underscored some of the limitations of established categories of human rights, which might be read as making a case for the "special character" of rights in this area, and the non-transferability of insights gained therein to other social movements. However, the struggle for special rights, or the recognition of identity in terms of the movement themselves, is by no means an isolated feature of the LGBTIQ movement, as scholarship on disability rights and the rights of older persons has shown.²¹⁴ Specifically, the development of rights

211. MARTEL, *supra* note 15, at 256–57.

212. Kees Waaldijk, *Standard Sequences in the Legal Recognition of Homosexuality—Europe's Past, Present and Future*, 4 AUSTRALASIAN GAY AND LESBIAN L. J. (1994).

213. ENGLE, *THE ELUSIVE PROMISE*, *supra* note 80. I am thankful to Damian Gonzalez-Salzberg for this insight.

214. See generally Michael Ashley Stein, *Disability Human Rights*, 95 CAL. L. REV. 1 (2007) (arguing for the existence of a disability rights model that challenges assumptions about the role of human rights); Frédéric Mégret, *The Disabilities Convention: Towards a Holistic Concept of Human Rights*, 12 INT'L J. HUM. RTS. 261 (2008) (arguing that the regime on persons with disabilities in international human rights law bridges a number of assumed dualities or dichotomies in the field of international human rights law more broadly, and is thus useful to

jurisprudence and standard-setting by social movements representing historically disadvantaged groups can challenge and modify aspects of international human rights law not only with respect to the group's interests but potentially also have spillover effects onto international human rights standards applying beyond the specific group.

In other words, a call for special rights and recognition of identity is not only a way of advancing human rights for a specific group. Still, it can have significant impacts on the possibilities of human rights law and these treaties as "living instruments," still valid to new and emerging needs and movements. That is not to say that there are no downsides to using the established categories, as the previous section has shown. The use of privacy to unpack and combat the effects of criminal law is one example. A key downside is that the need to demonstrate difference, central for the making of the movement, ultimately belies the overall emancipatory objective.²¹⁵ But that is the reason why many groups push for new instruments. LGBTIQ advocates themselves speak of creating specific instruments,²¹⁶ even if more efforts at present seem to be in litigation and including LGBTIQ perspectives in existing human rights law. An area in which there is less jurisprudence, but a greater push towards standard-setting, is the rights of older persons, and it offers a useful comparator for many of the main issues discussed in this Article.

The current movement for the rights of older persons seeks to create a new instrument. It confronts similar questions to those in the LGBTIQ context, ranging from the essentialization of the category (aging is very diverse and elastic)²¹⁷ to the matter of protecting rights ranging from privacy to participation in public life and broader social awareness and public participation.²¹⁸ Importantly, too, like LGBTIQ rights at first and disability rights now, the rights of older persons movement also mobilizes economic resources of the state in ways that older social movements could not.²¹⁹

Older persons have been more successful in working towards a specific instrument, but, as Herro and Byrnes have pointed out, the use of human rights was not a certainty, even if it has become the prevailing

rethinking the entire field); see also Annie Herro & Andrew Byrnes, *Transcending the Framing Contests over the Human Rights of Older Persons*, AUSTL. Y.B. INT'L L. (forthcoming 2020) (manuscript on file, cited with permission).

215. See generally Ernesto Laclau, *EMANCIPATION(S)* (1996). I am thankful to Caroline Compton for this insight.

216. MARTEL, *supra* note 15.

217. FRÉDÉRIC MÉGRET, *The Elderly*, in *THE ROUTLEDGE INT'L HANDBOOK OF HUM. RTS.* (Thomas Cushman ed., 2010).

218. Herro & Byrnes, *supra* note 214.

219. Annie Herro, *The Human Rights of Older Persons: The Politics and Substance of the UN Open-Ended Working Group on Ageing*, 23 AUSTL. J. HUM. RTS. 90 (2017).

language.²²⁰ Thinking of articulation as human rights as a contingent choice is an important reminder of how social movements mobilize around myriad platforms, and international human rights is only one of them. Further, international human rights language can have a deleterious effect in countries that are particularly hostile to the internationalization of these issues, and other tactics may be more useful in mobilizing and producing action.²²¹ Therefore, international human rights law and institutions serve a movement from their perspective, rather than the other way around.

Negotiations in the area of the rights of older persons are stalled, in no small part because of a tendency to frame the rights of older persons as suffering from a normative gap. The normative gap frame on the surface seems to perform a similar function to the idea of special rights, in that it underscores what is special about a group and how the existing framework is not fit for purpose. But it also leads to problems in political negotiations and mobilizing advocacy. Therefore, an alternative frame that focuses on the relative invisibility of a historically marginalized group might be preferable.²²² A “relative invisibility” frame does the same work as the move away from rights-based on privacy and towards recognition of identity in a public sense. It underscores that the claim for special rights is not necessarily one based on a normative gap, but one that a thick description of the reality of the historically disadvantaged group can resolve. It also shows that engaging rights based on privacy does little to address many of the issues at stake for a historically disadvantaged group, like their place in public life and social and economic rights.

There are some additional blind spots and pitfalls to be aware of and negotiate that speak less to specific tools and more to the use of international human rights more broadly. The professionalization of legal mobilization using international human rights mechanisms, for instance, is both a weapon and a liability.²²³ As Tilly has suggested, the professionalization of social movements is a key trend in the 21st century, but professionalization reduces innovation.²²⁴ Another aspect of this critique is David Kennedy’s concern with the professionalization of

220. *Id.*

221. In the context of the rights of older persons, see Annie Herro, *Advocating a UN Convention on the Rights of Older Persons in the United Kingdom: The Case for a Radical Flank*, J. HUM. RTS. PRAC. 1 (2019) (arguing that transnational advocacy networks, via more contentious forms of activism, can be a useful way of shifting positions within domestic, regional and global contexts).

222. Herro & Byrnes, *supra* note 214.

223. More broadly on the professionalization of activism in the LGBTIQ space, see David Paternotte, *The NGOization of LGBT activism: ILGA-Europe and the Treaty of Amsterdam*, 15 SOC. MOVEMENT STUD. 388 (2016).

224. TILLY, *supra* note 16, at 156.

international human rights, an unintended consequence of which is that one stops focusing on the problem to focus on the field instead.²²⁵ Rights piggybacking, therefore, can narrow the possibilities of the use of rights language, as the discussion above also shows. At the same time, it is the professional language of human rights that forces piggybacking since movements need to rely on a relatively closed set of rights provisions within which claims need to “fit.” All the while, the use of rights discourse can “become so powerful it takes up all available space for talking about justice,”²²⁶ meaning it can obfuscate claims for identity and redistribution that do not fit well within the essentialized boxes of strategic litigation.

Further, and back to the matter of international human rights law being only one option among many for social movements, the (over)use of international human rights mechanisms runs the risk of fraying the social fabric, “leading to individualist dissensus that ignores the common good.”²²⁷ It can also discount the voices of social movements themselves if the rhetoric is imposed solely from the outside (less likely in the context of adjudication, since it requires a victim bring a case). In systems similar to the European model, where the consensus doctrine is often used to build bottom-up support for emerging rights of social movements, particularly in areas affecting morality and social policy, internationalization itself may backfire.²²⁸ Even if the doctrine is not deployed everywhere, or at least not using domestic law as a basis for legitimacy,²²⁹ it still speaks to the challenges of using international litigation to promote largely domestic change in the rights of historically disadvantaged groups. However, there is literature suggesting that targeted litigation in the LGBTIQ area against one country can “substantially increase the probability of national-level policy change” throughout an entire region.²³⁰ Social movements need to decide whether the use of international mechanisms makes sense to promote change in

225. See generally DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* (2005).

226. Lalor, *supra* note 8, at 696.

227. BOB, *supra* note 56, at 7.

228. Ragone & Volpe, *supra* note 15, at 479; For a collection of essays on the consensus doctrine and its uses, see BUILDING CONSENSUS ON EUROPEAN CONSENSUS: JUDICIAL INTERPRETATION OF HUMAN RIGHTS IN EUROPE AND BEYOND (Panos Kapotas & Vassilis Tzevelekos eds., 2019).

229. See Lucas Lixinski, *The Consensus Method of Interpretation by the Inter-American Court of Human Rights*, 3 CAN. J. COMP. CONTEMP. L. 65 (2017).

230. Laurence R Helfer & Erik Voeten, *International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe*, 68 INT’L ORG. 77, 77 (2014); In the context of older persons and advocacy, see also Annie Herro, *Domestic Interest Groups and Rights Mobilization: Explaining the Case of Slovenia’s Support for the Proposed Convention on the Rights of Older Persons*, 18 GLOBAL NETWORKS: J. TRANSNAT’L AFF. 625 (2018) (arguing that social movement advocacy in relation to one country plays an important part in swaying an entire region).

the absence of support domestically or at least in neighboring or comparable countries.

There is no clear roadmap for social movements to create new instruments or to advance international jurisprudence for their interests as a means of promoting domestic or regional change. That said, there are issues that clearly must be taken into account. These include the relationship between public and private, which also speaks to the protection of practices versus identity; the choice between pre-existing rights and mechanisms, as opposed to new standard-setting; the uses of the international as a means of forcing domestic change across a region, and therefore short-circuiting stalled domestic politics versus the backlash against international interference; and more broadly, whether the use of international human rights language is to be done as a “soft” or “hard” tactic.

With respect to choosing existing mechanisms, the LGBTIQ example underscores the potentials and pitfalls of relying on existing instruments, and how they can reify identity and fall under traps that can prevent structural change in international human rights. The reliance on existing mechanisms can be a steppingstone in the struggle for special rights, but it would seem that the fight for special rights should not be abandoned in the name of sameness. That is not to say sameness should not be on the table for members of a historically oppressed group. Still, it is important to underscore that it often is not available or is just not a desirable choice. Making compromises for the sake of results in legal mobilization can fragment movements and leave behind those who need the protection of international human rights law the most, in favor of relatively privileged segments of a movement. Legal mobilization by social movements can thus enshrine and reinforce (relative) privilege in problematic ways, and, while they can be a pragmatic means of moving the discussion along, they should not be the endgame.

CONCLUDING REMARKS

International human rights (quasi-)adjudicatory institutions are important sites of tactics for emerging social movements. International human rights law’s counter-majoritarian instincts offer a welcoming haven for historically disadvantaged groups. And these movements share tactics, piggybacking because on the ground they have often found allies in one another, and internationally as an echo of those alliances and the fact they technically share a limited array of rights in the instruments being adjudicated. Tactics travel across social movements can influence how new ones establish tactics and strategies, as well as the potentials and pitfalls of certain argumentative lines.

Legal mobilization draws on those interactions and individualizes the claims of movements, which works to humanize the historically

disadvantaged group, but also can foreground certain interests at the expense of others. More “respectable” victims, and essentialized identities, come into play as tactical ploys, which also undermine the movement’s possibilities of promoting the change they sought to promote. International human rights law instruments and mechanisms can go from becoming a tool among many to having constitutive framing effects, narrowing down the possible claims of a movement. While a victory for one can be construed as a victory for the entire movement, the reality is that the “chosen” victims and their interests necessarily background other aspects of a movement, and leave them behind as a victory more often than not leads to the search for the next victory over a different claim, rather than an expansion of the existing victory to accommodate greater swathes of the movement.

The LGBTIQ example underscores those tensions, and it also shows the tendency to start with the articulation of a protected private sphere, followed by attempts to engage visibility and public life. Starting with the private sphere, however, produces ripple effects that become a burden on subsequent litigation, which will tend to refer back to the private realm, and therefore specific practices, at the expense of broader identity-based claims. International human rights law, thus, in a way adopts a tunnel vision and becomes monochromatic.

Emerging and future social movements that rely on legal mobilization and strategic litigation in international human rights fora would do well to rethink this path dependency and attempt to upend the rights paradigm from the start. International human rights law does contain the potential to acknowledge and celebrate identity, and emerging approaches like the right to a dignified life can prove to be a useful way to break path dependency. That way, international human rights law and institutions can serve those within a historically disadvantaged group upon whom the law bears most harshly, as opposed to the easy wins which, while desirable in the short term, can have lasting consequences in pigeonholing a movement and constricting its possibilities.